

ROGER DEAN GILLISPIE,
Plaintiff,

-vs-

THE CITY OF MIAMI TOWNSHIP, ET AL.,
Defendants.

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)
) CASE NO. 3:13-cv-416-TMR
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)
)
) JURY TRIAL
)
) VOLUME IV
)

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Courtroom Deputy: Elizabeth Penski

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Also Present: Roger Dean Gillispie, plaintiff; Valerie Barajas, paralegal; Matt Thibodeau, paralegal; Jeff Weber, IT

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1 P-R-O-C-E-E-D-I-N-G-S 8:52 A.M.

2 (In chambers at 8:52 a.m.)

3 THE COURT: First I wasn't going to meet with you,
4 and then I thought I am. And I thought I'd give you some
5 direction here on the record with regard to the proposed
6 witness.

7 The Court has heard the arguments -- well, first this is
8 being conducted in the conference outside the presence of the
9 jury with counsel.

10 The Court has heard the arguments of counsel. The Court
11 has, of course, by its order on the motion in limine basically
12 found Dr. Dysart to be qualified as an expert. I do
13 recognize -- I also recognize the scientific validity of such
14 a study and the aid it does provide to the jury as long as
15 testimony does not include the specific facts of the case,
16 including any credibility of any witnesses and/or the best
17 practices of police or appropriate policies or procedures with
18 regard to lineups, questions of law, or in any way infringe
19 upon the jury's role.

20 Said another way, testimony is limited to the general
21 principles of eyewitness identification and contamination by
22 third persons, and that includes testifying about something
23 being suggestive or negatively affecting the reliability of an
24 identification simply because that something may be
25 permissible under Ohio law. So she can testify regardless of

1 the -- she's not barred from testifying.

2 MR. OWENS: Thank you, Judge.

3 THE COURT: Okay with it -- I am not saying okay
4 with you, but everybody understand?

5 MR. McLANDRICH: Understand it, yeah. Not
6 particularly okay with it, just for the record.

7 THE COURT: I understand. No, no. Do whatever you
8 need do with the record, that's fine.

9 The only other thing I wanted to bring up is that -- I
10 think we settled this yesterday. If for any reason -- it's my
11 understanding that no one is going to tread in that direction,
12 but if anybody in any way, shape, or form contemplates going
13 toward any kind of an award by the State or that process, you
14 need to bring that to my attention before we tread into that.
15 I'm not saying you are, and I thought I was fairly secure that
16 no one was, but if you are going to do it, I need to know
17 about it before.

18 Was I clear enough?

19 MR. MAYER: I think so, Judge.

20 MR. OWENS: There is only one answer to that
21 question.

22 THE COURT: No, there's not. Maybe some judges work
23 that way. I don't. See you in there.

24 (Conference concluded at 8:55 a.m.)

25 (Jury in at 9:03 a.m.)

1 (In open court at 9:05 a.m.)

2 THE COURT: Good morning, everyone. Hopefully,
3 everyone had a restful evening and didn't stay up too late
4 watching the election results or whatever.

5 As always, my first question to you is, were you able to
6 abide by the court's admonition? Anybody that was not?

7 (No verbal response.)

8 THE COURT: Counsel ready to proceed?

9 MR. OWENS: Yes, Your Honor.

10 MR. McLANDRICH: Yes, Your Honor.

11 MR. HERMAN: Yes, Your Honor.

12 THE COURT: All right. Counsel.

13 MR. McLANDRICH: Thank you, Your Honor.

14 THE COURT: Mr. Gillispie, you are still under oath.

15 **ROGER DEAN GILLISPIE, PLAINTIFF, PREVIOUSLY SWORN**

16 **CROSS-EXAMINATION**

17 BY MR. McLANDRICH:

18 Q. Good morning, Mr. Gillispie.

19 A. How you doing?

20 Q. Good.

21 We've never met before, have we? I wasn't at your
22 deposition?

23 A. I don't think so.

24 Q. Your full name is Roger Dean Gillispie, sir?

25 A. That's what's on my birth certificate, yes.

1 Q. But you've always gone by Dean because your dad's name is
2 also Roger?

3 A. Correct.

4 Q. And yesterday you testified with respect to your work
5 schedule on the days of the sexual assaults, correct?

6 A. Yes.

7 Q. And you testified that you were at work on August 5th,
8 correct?

9 A. I would have to look, but, yes, I believe that's what I
10 said.

11 Q. Yes, sir. And in that regard --

12 MR. McLANDRICH: Jeff, would you please bring up
13 exhibit -- Defendant's Exhibit 15, please.

14 THE COURT: Is this one that's been shown?

15 MR. McLANDRICH: Yes. We --

16 MR. OWENS: No objection.

17 MR. McLANDRICH: -- showed them all this morning to
18 counsel, and I think we are in agreement.

19 THE COURT: Do you anticipate any objections to any
20 of the ones they want to display?

21 MR. OWENS: No, Your Honor.

22 THE COURT: Thank you. I appreciate it.

23 (Exhibit displayed.)

24 BY MR. McLANDRICH:

25 Q. Showing what's been marked as Defendant's Exhibit 15,

1 this is a letter that was sent from General Motors by
2 Mr. Wolfe to Detective Moore. And you notice we've
3 highlighted the day of August 5th, that Friday, and it shows
4 that you were off work.

5 MR. McLANDRICH: Jeff, would you go to the next
6 page, please.

7 (Exhibit published.)

8 BY MR. McLANDRICH:

9 Q. And this is the same copy of the schedule that
10 plaintiff's counsel reviewed with you yesterday, and you can
11 see for the Friday, August 5th, the 0 or circle that means,
12 according to the key at the bottom, day off. Do you see that?

13 A. Yes.

14 Q. And does that, in fact, refresh your recollection that
15 you were not working on the 5th? In fact, you were on a day
16 off that day?

17 A. Correct.

18 Q. So when you said yesterday that you were working on the
19 5th, you misspoke, incorrect?

20 A. Yes. The way this is set up, I didn't notice the dates
21 at the top. I mean the days of the week.

22 Q. With respect to August 20th, it's your testimony
23 yesterday that you believe you were in Kentucky with your
24 friends at Cave Lake, correct?

25 A. Correct.

1 Q. And as I understand your testimony and prior testimony,
2 that belief is predicated on the calendar of Homer Fyffe
3 showing that his dogs had had pups on or about that date,
4 correct?

5 A. Correct.

6 Q. All right. And I believe your prior testimony has been
7 that without that calendar date you would have no way of
8 remembering whether you were or weren't in Kentucky on that
9 particular date, correct?

10 A. Correct.

11 Q. Now, that calendar took some time to be found; isn't that
12 right?

13 A. Yes.

14 Q. And then it's my understanding it went missing again for
15 a period of time and then was found again; is that correct?

16 A. That's the way I understand it.

17 Q. And you never had custody and control of that calendar,
18 correct?

19 A. No.

20 Q. You can't testify to the accuracy of that calendar,
21 correct?

22 A. Correct.

23 Q. And with respect to your whereabouts on the days of the
24 sexual assaults, these are the same explanations, alibis,
25 alleged alibis that were offered at your two criminal trials,

1 correct?

2 A. Correct.

3 Q. And notwithstanding those two alibis, those two juries
4 found you guilty, correct?

5 A. Correct.

6 Q. And you testified yesterday to a number of other things
7 with respect to yourself in contrast to the descriptions of
8 the perpetrator described by the two ladies. In other words,
9 that you don't smoke, and there was some indication that the
10 perpetrator had smoked a cigarette. Do you recall that?

11 A. Repeat the question.

12 Q. Sure, sure. Let me just reask it a little differently.

13 So one of the things that had been indicated by the
14 ladies who were the subject of these assaults was that, for
15 B.W. and C.W., that the individual had asked for a cigarette
16 and stolen a pack of cigarettes from them. Do you recall
17 that?

18 A. Yes.

19 Q. And then I believe with S.C., while she is sitting in the
20 car with the perpetrator, that the perpetrator had smoked a
21 cigarette. Do you recall that?

22 And if you don't, that's fine. I mean --

23 A. I mean, this was something that happened at the trial,
24 so I would have to see -- I don't remember these questions
25 from yesterday.

1 Q. All right. No, that's fine. If you don't recall, you
2 don't recall. That's fair enough.

3 In any event, you testified yesterday, and you would have
4 testified at the criminal trial, that you are a non-smoker and
5 don't like being around cigarette smoke?

6 A. Correct. I do not like it at all.

7 Q. And likewise testified that, don't wear a gold chain with
8 a gold medallion and didn't at that time?

9 A. No.

10 Q. And notwithstanding that testimony, again was found
11 guilty at the two criminal trials, correct?

12 A. Correct.

13 Q. Now, with respect to Detective Moore, you don't have any
14 personal information that indicates to you that he was ever in
15 possession of any reports that he suppressed or destroyed,
16 correct?

17 MR. OWENS: Objection to the extent it calls for
18 information that's held by counsel.

19 THE COURT: I think his question was do you have any
20 information to that. If he doesn't, then he doesn't. I mean,
21 if he doesn't know, he doesn't know. Is that your objection?

22 MR. OWENS: I hate to interrupt. Can we just -- can
23 I address the Court on sidebar on this?

24 THE COURT: Sure.

25 (At sidebar.)

1 THE COURT: Counsel.

2 MR. OWENS: This is David Owens on behalf of
3 plaintiff. My concern is just that the question is, so, for
4 example, there are grand jury transcripts in which, you know,
5 Moore talks about I have the camping receipts, got them for
6 the month before he was down there a few days later. If I
7 discussed that with Mr. Gillispie hypothetically, it seems
8 like your question is, you know, are you asking him about that
9 or are you just saying --

10 MR. McLANDRICH: Well, my question was does he have
11 any personal knowledge of reports written by Fritz and Bailey
12 that were suppressed and destroyed by Gillispie.

13 MR. OWENS: You asked him about the alibis.

14 MR. McLANDRICH: Not in that question.

15 THE COURT: The question before the Court was to the
16 effect of do you have any information or do you know,
17 personally know, whether or not Moore ever possessed the
18 reports. Reports. I think that was the question.

19 MR. OWENS: I thought you said the camping receipts.

20 MR. McLANDRICH: No, no.

21 MR. OWENS: I misheard you. No problem.

22 (In open court.)

23 THE COURT: I'm not sure, counsel, was that an
24 objection?

25 MR. OWENS: I withdraw the objection. Thank you.

1 THE COURT: You can reask the question.

2 MR. McLANDRICH: Yes, sir.

3 BY MR. McLANDRICH:

4 Q. Mr. Gillispie, you're aware that there is an allegation
5 in this case that there were certain reports allegedly written
6 by Detective Bailey and approved by Detective Fritz that were
7 destroyed or suppressed by Detective Moore, correct?

8 A. Yes, I know that now, yes.

9 Q. And do you have any personal information that would
10 indicate to you or indicate to the jury that Detective Moore
11 was in possession of those reports and suppressed or destroyed
12 them?

13 A. I wouldn't have knowledge of that.

14 Q. Thank you. With respect to the campground receipts, do
15 you recall the testimony that's been offered that you and
16 Mr. Fyffe would go to Kentucky, down to Cave Run, and
17 Mr. Fyffe would register, since he had the boat and the truck,
18 he would register, and then a receipt for that registration
19 would be created by the campground, correct?

20 A. Correct.

21 Q. All right. And it was always Mr. Fyffe, in fact, that
22 would sign in and not yourself, correct?

23 A. Correct.

24 Q. So if someone was to try and find receipts that were
25 pertinent to the circumstance, they would be looking for

1 Mr. Fyffe's name and not your name, correct?

2 A. I don't know what they would look for.

3 Q. Well, if we were going to look for receipts, I think we
4 agree that the receipts would have Mr. Fyffe's name on them
5 and not yours. That's all I am asking.

6 A. There was receipts with my name on them. I went down
7 myself also.

8 Q. Okay. And, in fact, you went down with Mr. Fritz,
9 correct?

10 A. At a -- yes, at a point.

11 Q. And when you and Mr. Fyffe would drive from essentially
12 Fairborn to Morehead, Kentucky, how long a drive is that? How
13 long does that take?

14 A. It's about three and a half hours.

15 Q. All right. And so when you and Mr. Fritz drove to
16 Morehead, it would have been about the same three and a half
17 hours?

18 A. Been the same route.

19 Q. Right. And so three and a half hours down, however long
20 at the campground to look at receipts, and three and a half
21 hours back, correct?

22 A. Approximate.

23 Q. So you are together, let's say, seven to seven and a
24 half/eight hours for that particular day?

25 A. Are you referring to me and Fyffe or Fritz?

1 Q. You and Fritz. I'm sorry.

2 A. That would be approximately the -- yes.

3 Q. And so Mr. Fritz, presumably since he signed this report
4 allegedly written by Mr. Bailey, would have knowledge of its
5 existence, correct?

6 MR. OWENS: Objection; foundation.

7 THE COURT: Sustained.

8 BY MR. McLANDRICH:

9 Q. If, in fact, there was a report authored by Mr. Fritz --
10 I'm sorry -- by Mr. Bailey that Mr. Fritz signed off on, he
11 would be aware of what he signed, no?

12 MR. OWENS: Objection; foundation.

13 MR. McLANDRICH: It's a hypothetical question.

14 THE COURT: If he knows, he can answer.

15 THE WITNESS: I would not know.

16 BY MR. McLANDRICH:

17 Q. All right. In any event, we know the allegation in this
18 case is that there was this report that excluded you as a
19 suspect authored by Mr. Bailey and signed off on by Mr. Fritz
20 as his supervisor. We've already agreed to that, correct?

21 A. You will have to ask that a different way.

22 Q. Okay. So it's my understanding, and perhaps you are not
23 aware, but it's my understanding that there is an allegation
24 in this case that Detective Bailey authored a report that said
25 you weren't a good suspect, and the allegation is that

1 Detective Moore somehow prevented that from being supplied to
2 your defense counsel. Are you aware of that allegation?

3 A. I'm aware of it through the trial.

4 Q. Through whatever means --

5 A. Okay.

6 Q. -- you're aware, right?

7 A. Right. I knew nothing beforehand.

8 Q. I understand.

9 A. Through the -- yeah.

10 Q. I understand.

11 A. Okay.

12 Q. And my question is very simple, though. In the seven and
13 a half to eight hours that you and Mr. Fritz are together, at
14 no time does he say to you, "Mr. Gillispie, there's a report
15 that excluded you as a suspect that Detective Bailey wrote,"
16 correct?

17 A. Not that I recall.

18 Q. All right. And, in fact, he was functioning as the
19 criminal investigator for your defense team during this time
20 that you are going to Morehead, Kentucky, with him, correct?

21 A. Correct.

22 Q. And I think that everyone would agree, and you would
23 agree, would you not, that that report, if it existed, would
24 be an important piece of information, correct?

25 A. I would have to agree, yes.

1 Q. All right. Because, in fact, it's one of the primary
2 reasons that we're here with this case and the reason that
3 your conviction was vacated, correct?

4 A. Correct.

5 Q. All right. And so if he was in possession of this
6 particularly important piece of information and he was working
7 for you, wouldn't you presume that he would convey that
8 information to you?

9 MR. OWENS: Objection; foundation.

10 MR. McLANDRICH: Again, it's hypothetical.

11 MR. OWENS: It seems like he's asking the wrong
12 witness.

13 THE COURT: Sustained.

14 BY MR. McLANDRICH:

15 Q. In any event, no time during that seven and a half or
16 eight hours did he convey that information to you?

17 A. No.

18 Q. All right. And, in fact, not during any other
19 conversation that you ever had with Mr. Fritz did he convey
20 that information to you?

21 A. No.

22 Q. And as far as you know, he never conveyed that
23 information to your defense team at any time before or during
24 either of your two criminal trials?

25 A. His conveyance to someone else, I have no idea.

1 Q. All right. Now, you have no reason to believe that
2 Detective Moore bore you any particular ill will, correct?

3 A. At that time I didn't know who he was.

4 Q. All right. And, therefore, presumably has no basis to
5 presume that he bore you any ill will, correct?

6 MR. OWENS: Objection, Your Honor.

7 THE COURT: Sustained. He didn't know who he was.

8 BY MR. McLANDRICH:

9 Q. And as far as you know, he didn't know who you were
10 before this case, correct?

11 MR. OWENS: Objection, Your Honor.

12 THE COURT: Sustained.

13 BY MR. McLANDRICH:

14 Q. You testified yesterday that you were at the Warren
15 Correctional Institute, correct?

16 A. Yes.

17 Q. And at some point you were transferred from that facility
18 to a lower security facility?

19 A. Yes.

20 Q. And that was, what, ten years into your sentence?

21 A. Approximately.

22 MR. McLANDRICH: Jeff, would you bring up
23 Plaintiff's 54, page 80.

24 MR. OWENS: Did you say 54?

25 MR. McLANDRICH: Yes.

1 (Exhibit published.)

2 BY MR. McLANDRICH:

3 Q. So, Mr. Gillispie, this is a photograph that you were
4 asked about yesterday by your counsel, and I believe you
5 indicated that you were at your brother, James's house,
6 correct?

7 A. Correct.

8 Q. All right. And do you see the tan line on your right
9 arm? Do you see where it's white just below the shirt and
10 then lower down it's much darker?

11 A. I don't see a tan line, no. I -- no.

12 Q. All right.

13 MR. McLANDRICH: Jeff, would you bring up 284-4 of
14 Plaintiff's, please.

15 (Exhibit displayed.)

16 BY MR. McLANDRICH:

17 Q. Showing you Plaintiff's Exhibit 284, this is you and
18 another gentleman. Who's the other gentleman?

19 A. That's my friend Brian Poulter.

20 Q. All right. And do you know when this picture was taken?

21 A. I have no idea.

22 Q. And does your face appear to be tanned in that picture?

23 A. No.

24 MR. McLANDRICH: Take it down.

25 BY MR. McLANDRICH:

1 Q. Now, there's been testimony that Mr. Wolfe, who used to
2 also work at GM, brought some GM identification badges to the
3 Miami Township Police Department. Do you recall that?

4 A. During the trial, yes.

5 Q. All right. And you didn't have any particular
6 relationship with Mr. Wolfe during your employment at GM,
7 correct?

8 A. You'll have to -- I don't know what you mean by
9 "relationship."

10 Q. Well, he was not your direct supervisor, correct?

11 A. Correct.

12 Q. Didn't have any run-ins with him where he expressed any
13 animosity towards you?

14 A. Several.

15 Q. Okay. Tell me about those.

16 A. You want me to tell you about?

17 Q. Your interaction with Wolfe.

18 A. Wolfe was the head of several GM plants' security at
19 GM. So he came on site frequently.

20 Q. I understand. But did you have personal interaction with
21 him?

22 A. Yes.

23 Q. And it's your allegation that during those interactions
24 you had some sort of expressed animosity between you?

25 A. Yes. He had animosity, yes.

1 Q. Do you recall being asked about that at your deposition?

2 MR. OWENS: Can you clarify? About what?

3 BY MR. McLANDRICH:

4 Q. About whether you had any interaction with Wolfe that
5 expressed animosity between you?

6 A. I was questioned, yes.

7 MR. McLANDRICH: Would you bring up Exhibit
8 Defendant's 45, please, page 176.

9 (Exhibit displayed.)

10 BY MR. McLANDRICH:

11 Q. And you were asked the question, "Explain to me what the
12 average occasion like -- how would -- that would work."

13 And your answer was, "He was a person who would be able
14 to drive into the plant. So you would register their vehicle
15 as someone entering the plant."

16 MR. McLANDRICH: Next page, please.

17 BY MR. McLANDRICH:

18 Q. And then you were asked the question at line 6, "Is there
19 any particular incident that you recall?"

20 Answer, "No."

21 Next question, "Okay. Do you have any personal knowledge
22 that leads you to believe --" I'm sorry. That's not -- strike
23 that.

24 That's all, thank you.

25 So during your deposition, there were no particular

1 incidents that you testified to, correct?

2 **A.** I need to look at this here again. I need to see this
3 again.

4 Is that okay, sir?

5 THE COURT: If it's going to --

6 MR. McLANDRICH: I'm done with it.

7 THE COURT: Well --

8 MR. McLANDRICH: You want to see it again?

9 THE COURT: -- let him see the last page.

10 MR. McLANDRICH: Sure.

11 (Exhibit displayed.)

12 THE COURT: I assume that's what he wants to see.

13 THE WITNESS: Yes.

14 BY MR. McLANDRICH:

15 **Q.** So you were asked the question, "And what was the extent
16 of your interaction with Mr. Wolfe during your employment?"

17 And your answer, "He was the head of supervision. I am
18 sure we had general conversations about the day or whatever."

19 "Question: Is there any particular incident that you
20 recall?"

21 "Answer: No."

22 **A.** Yeah, there was a whole thing that was missing when you
23 were speaking there. I just wanted to make sure that was --
24 okay.

25 **Q.** He was the head?

1 A. Right, right.

2 Q. And your answer when asked at your deposition whether
3 there were any particular incidents between you, you answered
4 "No."

5 A. Okay.

6 Q. And was that a correct answer when you gave it on
7 November 5, 2018?

8 A. That was the answer on that deposition there.

9 Q. But today you'd like to give us a different answer?

10 MR. OWENS: Objection; argumentative.

11 THE COURT: Well, do you wish to give a different
12 answer to that?

13 THE WITNESS: No. I'm just -- I needed to see that.

14 THE COURT: You can take that transcript down.

15 BY MR. McLANDRICH:

16 Q. With respect to the campground in Kentucky, were there
17 other campsites that you and your friends would go to where
18 you didn't, in fact, have to sign in and register?

19 A. There was a campground on the other side of the lake
20 that we may have went to once or twice.

21 Q. And whenever you went to this other campground, whatever
22 occasions those were, on those occasions there would be no
23 receipt because there would be no registration required,
24 correct?

25 A. This was a man who had a house with four spots you

1 could camp on.

2 Q. My question was a little different. My question was,
3 when you went to the alternate campsite, you didn't have to
4 register with the park rangers. So there would be no receipt,
5 correct?

6 A. It was not a campground. It was a camping spot.

7 THE COURT: I think the question was did you have to
8 register.

9 THE WITNESS: No.

10 BY MR. McLANDRICH:

11 Q. Since your release, have you received any mental health
12 treatment?

13 A. Extensively.

14 MR. McLANDRICH: Would you again pull up Deposition
15 45? Page 84, please.

16 (Exhibit displayed.)

17 BY MR. McLANDRICH:

18 Q. You were asked this question at line 12. "Question:
19 Have you seen a mental health professional since your release
20 from prison?"

21 "Answer: No."

22 A. At that time.

23 Q. And so what you're saying is that since November 5, 2018,
24 you've been seeking mental health treatment?

25 A. As soon as this deposition was over.

1 Q. And who's that with?

2 A. Donna Mayerson.

3 Q. Now, do you recall a man named Mr. Miller who also was a
4 supervisor at GM?

5 A. Yes.

6 Q. And was he a more direct supervisor of you?

7 A. Correct.

8 Q. And did you have a mostly positive relationship with
9 Mr. Miller?

10 A. I felt it was.

11 Q. When you initially met with Detective Moore at the police
12 department, it's correct that you didn't recall where you were
13 on August 5th or August 20th, correct?

14 A. That was two years before I was in there, yes.

15 Q. And then as you testified yesterday, spent some time
16 trying to figure out where, in fact, you were?

17 A. Correct.

18 Q. And then eventually your friend Jerry and/or his father
19 locate the calendar which we've talked about with respect to
20 August 20th?

21 A. Correct.

22 Q. And with respect to August 5th, we don't have any
23 documentation as to where you were, correct?

24 A. Correct.

25 Q. You testified yesterday with respect to the time where

1 you were going to school at Sinclair College. Do you recall
2 that?

3 A. Yes.

4 Q. Either as a part of that schooling or otherwise, did you
5 take a 120-hour police course?

6 A. That was separate from the Sinclair.

7 Q. All right. But you took such a course?

8 A. Correct.

9 Q. With respect to your severance of employment from General
10 Motors, you did, in fact, shut down the worksite without
11 authorization, correct?

12 A. Correct.

13 Q. So it wasn't GM just firing you for no reason, correct?

14 A. When I was on the site, I was the -- in charge of that
15 site.

16 Q. Be that as it may, they didn't authorize you to shut the
17 site down. You took that into your own authority; regardless
18 of whether you had the authority or not, you shut it down,
19 correct?

20 A. Correct.

21 Q. So they didn't just make up something to fire you. You
22 shut the site down. They didn't feel that was appropriate,
23 and they let you go?

24 MR. OWENS: Objection; foundation.

25 THE COURT: Sustained.

1 If you want to rephrase, you can.

2 MR. McLANDRICH: All right.

3 BY MR. McLANDRICH:

4 **Q.** They didn't make up a story of you shutting down the
5 worksite. You did that, correct?

6 **A.** Correct.

7 **Q.** And then when challenged about it, you said I quit and
8 they said you're fired. That was your testimony yesterday,
9 correct?

10 **A.** Correct.

11 MR. McLANDRICH: That's all I have for you,
12 Mr. Gillispie. Thank you for your time.

13 THE COURT: Thank you, counsel.

14 Questions with regard to anything that was covered on
15 cross.

16 MR. OWENS: Yes, Your Honor. Just a few.

17 **REDIRECT EXAMINATION**

18 BY MR. OWENS:

19 **Q.** You were asked a couple questions about being transferred
20 to London Correctional Facility after being at Warren for a
21 while. Do you remember that?

22 **A.** Yes.

23 **Q.** And that was a -- was that a lower, technically, security
24 classification facility?

25 **A.** Yes. That was medium/minimum.

1 Q. Was everything about that -- strike that.

2 Was that a -- were there still -- were you still in
3 prison when you were at London?

4 A. Oh, absolutely.

5 Q. Were the sleeping arrangements better or worse than being
6 at Warren?

7 A. Worse.

8 Q. How so?

9 A. I went from a two-man --

10 MR. McLANDRICH: Objection, Your Honor. This is
11 outside the scope of what was asked.

12 THE COURT: Well, you led into the transfer. I am
13 going to allow it to some degree.

14 Go ahead. You can answer.

15 THE WITNESS: I went from a two-man cell to an open
16 dorm, where it's headboard to headboard, side by side, wide-
17 open living.

18 BY MR. OWENS:

19 Q. Did that impact your sleep?

20 A. You don't get sleep.

21 Q. You mentioned that you started seeking mental health
22 treatment after your deposition in 2018; is that right?

23 A. Yes.

24 Q. And was your deposition itself the -- part of the reason
25 why you started getting mental health treatment at that point?

1 **A.** Yeah, absolutely. That was the worst day of my entire
2 life at that point. Violently ill after that and needed to
3 know why.

4 MR. OWENS: That's it. Thank you.

5 MR. McLANDRICH: Nothing further, Your Honor.

6 THE COURT: Is this witness excused?

7 MR. OWENS: Yes, Your Honor.

8 THE COURT: Thank you very much, Mr. Gillispie.

9 Counsel, do you have another witness there?

10 MR. KANOVITZ: Just a moment, Your Honor. We were
11 expecting 10 a.m.

12 THE COURT: If there is going to be a necessity of a
13 break, I don't want to keep the jury sitting here. Five
14 minutes or what?

15 MR. KANOVITZ: I think it probably makes sense to
16 let the jury have a little break.

17 THE COURT: Let's break for about ten minutes, and
18 then we will hopefully reconvene at that time.

19 THE COURTROOM DEPUTY: All rise. This court stands
20 in recess.

21 (Jury out at 9:40 a.m.)

22 (Recess at 9:40 a.m.)

23 (Jury in at 9:57 a.m.)

24 (In open court at 9:58 a.m.)

25 THE COURT: We are back on the record. Counsel

1 ready to proceed?

2 MR. KANOVITZ: We are, Your Honor.

3 MR. McLANDRICH: Yes, sir.

4 MR. HERMAN: Yes, Your Honor.

5 THE COURT: Next witness.

6 MR. KANOVITZ: At this time plaintiff calls Jim
7 Petro.

8 THE COURT: All right.

9 **JAMES M. PETRO, PLAINTIFF'S WITNESS, SWORN**

10 THE COURT: Mr. Petro, we have -- sometimes we have
11 a little difficulty in everyone at the back of the courtroom
12 hearing everyone. And we have the microphone there for you.
13 If it gets too close, it will muffle you; if it gets too far
14 away, it won't pick you up.

15 THE WITNESS: Okay.

16 THE COURT: So what I need you to do is try to keep
17 your voice up so that hopefully no one will have a problem,
18 all right?

19 THE WITNESS: Yes. Thank you, Your Honor.

20 **DIRECT EXAMINATION**

21 BY MR. KANOVITZ:

22 Q. Good morning.

23 A. Good morning.

24 Q. Could you state and spell your name for the record,
25 please?

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1 A. My name is James, middle initial M., Petro, P as in
2 "Paul," -E-T-R-O.

3 Q. And do you go by Jim?

4 A. Yes.

5 Q. And where are you from, sir?

6 A. I'm originally from Brooklyn, Ohio. We raised our
7 family in Rocky River, Ohio. I had part of my career in
8 Columbus, Ohio. I'm from Ohio.

9 Q. And where do you live currently?

10 A. Currently, we live in Naples, Florida, and we have a
11 home near our daughter for the summertime in New England.

12 Q. And did you travel to be here today?

13 A. Yes, we did.

14 Q. How did you get here?

15 A. By car.

16 Q. And are you working or retired?

17 A. I'm retired.

18 Q. And during the course of your career prior to retirement,
19 did you hold public office?

20 A. I did.

21 Q. Can you tell us some examples of public offices that you
22 held?

23 A. My last public office, I was Chancellor of Ohio's
24 public universities. Prior to that I was the Attorney
25 General of Ohio. I was the auditor of the State of Ohio. I

1 was a member of the Ohio General Assembly. God, there are
2 more, and I can't think of them all.

3 Q. Fair enough.

4 A. But I did -- largely, I am a practicing lawyer. But I
5 largely was in public life in addition to a private law
6 practice. I was a partner in several large law firms.

7 Q. Understood. At a certain point in time, did you also
8 work as a prosecuting attorney?

9 A. I did.

10 Q. And did you try criminal cases when you were a
11 prosecuting attorney?

12 A. I did.

13 Q. And did any of your cases involve sexual assaults?

14 A. They did.

15 Q. And did they involve issues of eyewitness
16 identifications?

17 A. Yes.

18 Q. And in the course of your work as a prosecutor, did you
19 come to have a good understanding of the limits of eyewitness
20 evidence?

21 A. I certainly did.

22 Q. And moving forward, when you were Attorney General, did
23 you enjoy serving in that role?

24 A. I did. It was a very interesting job.

25 Q. Can you tell the jury a little bit about what the

1 responsibilities of your office was?

2 **A.** The Attorney General is the chief legal officer in the
3 State of Ohio. The Attorney General's Office deals with
4 litigation, but it deals with many, many other things --
5 providing legal services across the state for local
6 governments, handling from a standpoint of providing lawyers
7 and law services to all of the elements of state government.

8 I had an organization of about 13 or 1,400 people, and
9 we functioned with about six offices. There is an Attorney
10 General's Office right in Cincinnati. There was one right
11 in Dayton. We had offices around the state.

12 **Q.** Thank you. And after you left public life, did you have
13 occasion to publish anything on the topic of wrongful
14 convictions?

15 **A.** I did. Along with my wife, we published a book
16 called --

17 MR. McLANDRICH: Objection, Your Honor. What's the
18 relevance of this?

19 THE COURT: Counsel?

20 MR. KANOVITZ: He's establishing some expertise.

21 THE COURT: Hold on.

22 MR. McLANDRICH: This is not an expert witness, Your
23 Honor.

24 THE COURT: Counsel approach.

25 (At sidebar.)

1 MR. McLANDRICH: Your Honor, I'd raised this concern
2 at the final pretrial. They have listed these individuals,
3 Mr. Godsey and Mr. Petro, as expert witnesses. I mean, a
4 certain amount of, you know, gilding the lily in terms of his
5 background I understand, but this is not an expert witness.
6 And it seems to me that we are headed for trying to solicit
7 opinion testimony, you know, does his knowledge of eyewitness
8 identifications and so forth and so on. I don't think he gets
9 to testify to any of that. There's been no report provided.
10 And I just think it's improper.

11 MR. KANOVITZ: Rule 26 distinguishes between
12 retained experts and people who have a connection to the
13 underlying case but who, nevertheless, have expertise that may
14 in the form of testimony that they are going to give that is
15 directly related to their involvement in the underlying case.
16 Mr. Petro is that sort of expert. This is a two-question
17 establishment of the fact that he has the expertise to then
18 talk credibly about habeas.

19 MR. McLANDRICH: And even assuming that was true,
20 which I don't agree to, he is not like a treating physician.
21 The fact that he writes a book about wrongful conviction has
22 nothing to do with anything other than just additional sort of
23 gilding of the lily with respect to the opinion testimony that
24 seems to be the direction that we're headed.

25 THE COURT: Where are you going with this?

1 MR. KANOVITZ: Basically, he wrote the book.

2 THE COURT: I got that he wrote the book.

3 MR. KANOVITZ: I am not going deeper into the book.

4 THE COURT: No, no, I am not talking about the book.
5 Where are you going with the testimony?

6 MR. KANOVITZ: I am going to his involvement as a
7 habeas attorney, explain to the jury what a habeas is: You
8 participated in the petition. It was preempted. And you got
9 to know Dean through that process, and you are friends with
10 Dean. And not much more than that. I don't remember, but
11 that's pretty much the scope.

12 MR. McLANDRICH: So we've already stipulated to the
13 fact that a habeas petition was filed. I don't think that
14 anybody other than the judge gets to talk about what the law
15 is in terms of what a habeas is. And we already stipulated
16 that the habeas was granted. So we don't need this witness to
17 testify to that either.

18 THE COURT: And there is -- the Court has limited
19 and basically said that we're not going to get into these
20 decisions.

21 MR. KANOVITZ: I was just going to see what relief
22 he asked for, and the relief was granted.

23 MR. McLANDRICH: That's already been stipulated to.

24 THE COURT: Hasn't that been stipulated?

25 MR. McLANDRICH: That's the point of stipulations,

1 you don't put on evidence to something that's been stipulated
2 to.

3 MR. KANOVITZ: I would like to ask him about
4 participating; that he was at a number of hearings; that he
5 got to know Dean; and that, you know, he signed the petition
6 on behalf of Dean. I would like to get that far into the
7 habeas stuff.

8 MR. McLANDRICH: And, again, so what this is is an
9 effort to, you know, buttress the credibility of it by showing
10 that we've got the former Attorney General that signed onto
11 the habeas petition. This is all just gilding of the lily
12 that's unnecessary.

13 He can certainly testify he met Dean and that he's come
14 to know Dean. That's not objectionable testimony. But I
15 think this effort to buttress the validity of the habeas
16 petition and therefore the underlying reason for the habeas
17 when we've stipulated --

18 THE COURT: No. He didn't say anything about -- you
19 are not going to do the underlying reason, are you?

20 MR. KANOVITZ: No. I am just going to talk about
21 the fact that he participated.

22 MR. McLANDRICH: I understand he is not --

23 THE COURT: I understand. But they are calling him
24 for a witness. And they are saying that basically he became
25 involved in the case. He went through the habeas matter. The

1 habeas was granted, and he got to know Dean.

2 MR. KANOVITZ: Yeah.

3 MR. McLANDRICH: That -- that part I can choke down.

4 MS. FRICK: To the extent he would -- Dawn Frick --
5 that I would want to go into, at least with his expertise as a
6 prosecutor, in the case of legal officer.

7 THE COURT: No, no. We are not going there. We are
8 just not going there.

9 MS. FRICK: Okay.

10 THE COURT: Because his expertise would -- I am not
11 necessarily contesting his expertise at whatever, whatever,
12 but what I am contesting is the fact that the stipulations are
13 on. It tells what the story is. Now, if he wants to say he
14 came on board -- I signed the petition. The habeas was
15 granted, and I got to know Dean," and he'll choke that down.

16 MR. McLANDRICH: And as long as he is not saying the
17 reason I signed the petition was to right this injustice and
18 stop --

19 THE COURT: No, no argument.

20 MR. KANOVITZ: If he starts on that, I will step on
21 it.

22 THE COURT: I will too.

23 MR. McLANDRICH: Thank you.

24 (In open court.)

25 THE COURT: All right. The objection is overruled

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1 in the parameters that the Court has laid out to counsel.

2 MR. KANOVITZ: Thank you, Your Honor. May I
3 proceed?

4 THE COURT: You may.

5 BY MR. KANOVITZ:

6 Q. Switching topics, sir. Did you eventually participate in
7 filing a habeas petition on Dean's behalf?

8 A. Yes, I did.

9 Q. And was the relief requested to free Dean from
10 incarceration?

11 A. Yes, it was.

12 Q. And without going into the details of how a habeas
13 proceeding works, was there a formal document that was filed
14 in order to have those proceedings go forward?

15 A. Yes.

16 Q. And did you personally sign that document?

17 A. I did.

18 Q. And would you have done that if you didn't have a genuine
19 belief that there was --

20 MR. KANOVITZ: Actually, may I withdraw that?

21 THE COURT: You may.

22 MR. KANOVITZ: Thank you.

23 BY MR. KANOVITZ:

24 Q. Did the Court ultimately grant the petition?

25 A. Yes.

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1 Q. And in terms of the process of reaching the conclusion,
2 were there multiple court hearings?

3 A. Yes.

4 Q. And did you participate in them?

5 A. I did.

6 Q. Did you develop a friendship with Dean in that process?

7 A. I did.

8 Q. And has your friendship continued since his release?

9 A. It has, yes.

10 Q. How would you characterize that friendship?

11 A. We don't see each other often, but I have respect for
12 Dean and an understanding of what he went through. And I
13 respect his family. His mother and dad are salt-of-the-
14 earth folks. I came to know the family and enjoy knowing
15 them.

16 Q. And is that a friendship you hope will continue into the
17 future?

18 A. Yes.

19 MR. KANOVITZ: No further questions.

20 THE COURT: Nothing?

21 MR. McLANDRICH: No, sir, Your Honor. Thank you.

22 THE COURT: Anything back there?

23 MS. FRICK: No, Your Honor.

24 THE COURT: Thank you. Is this witness excused?

25 MR. KANOVITZ: Yes.

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1 THE COURT: Mr. Petro, thank you very much.

2 MR. KANOVITZ: Your Honor, may I go outside real
3 quick?

4 THE COURT: Surely.

5 MR. KANOVITZ: Your Honor, the next witness is in
6 the elevator. So he will be here momentarily.

7 THE COURT: All right.

8 MR. KANOVITZ: Thank you.

9 THE COURT: Counsel, do you have somebody out there
10 that when he comes off the elevator he knows what to do?

11 MR. KANOVITZ: I think I put the fear into him. Let
12 me just make sure.

13 THE COURT: All right.

14 MR. KANOVITZ: He's out there now.

15 THE COURT: All right. Next witness.

16 MR. OWENS: Our next witness is Scott Bowling, Your
17 Honor, B-O-W-L-I-N-G.

18 THE COURT: All right.

19 **SCOTT BOWLING, PLAINTIFF'S WITNESS, SWORN**

20 THE COURT: Mr. Bowling, please try to keep your
21 voice up so we can all hear your responses to the inquiries.
22 You have a microphone there. And you can use it as you need.
23 If it gets too close, it muffles you; if it gets too far away,
24 it won't pick you up.

25 THE WITNESS: Okay.

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1 THE COURT: So if you keep your voice up, that
2 solves the problem to a great extent, okay?

3 THE WITNESS: Sure.

4 THE COURT: You may inquire.

5 MR. OWENS: Thank you, Your Honor.

6 **DIRECT EXAMINATION**

7 BY MR. OWENS:

8 Q. Good morning, sir.

9 A. Hello.

10 Q. Could you just please introduce yourself to the jury?
11 What's your name?

12 A. My name is Scott Bowling.

13 Q. And where did you grow up?

14 A. In the big City of Fairborn, Ohio.

15 Q. And what year did you graduate high school?

16 A. 1985.

17 Q. And did you graduate high school with any -- did you go
18 to high school with anybody in this room?

19 A. I sure did, yes.

20 Q. Who is that?

21 A. Mr. Dean Gillispie.

22 Q. And how did you know Dean in high school?

23 A. We all ran in the same circle of friends, spent a lot
24 of time, you know, from like 16 years of age on up through
25 until we kind of parted ways and went about our own

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1 separate, you know, marriage and all that type stuff.

2 Q. Got it. And did you hang out with him in the years after
3 high school as young adults?

4 A. Yes.

5 Q. What kind of things did y'all get into?

6 A. Well, early on I'd hang out with him when we worked.
7 First thing -- I recall first thing we did together was
8 tried to rehab a house that he had purchased.

9 Q. And did you have experience in that or --

10 A. I do now, yes, sir. Yes, sir.

11 Q. At the time?

12 A. At the time I did not. I was just basically a grunt.

13 Q. And was it just you and Dean, or did you work with some
14 other folks?

15 A. If I remember right, I think some people, other friends
16 played a part in trying to help him get established.

17 Q. Got it. And was there -- just, can you just -- I'm
18 sorry. I jumped ahead a little bit. Can you just let us know
19 where you started to work after high school?

20 A. After high school, I started in a car wash and then
21 went straight from that to what I thought I would spend the
22 rest of my days. And then I went to work for Delco
23 Products, which is now -- used to be Delphi, and then I
24 spent 18 years there. And they filed for bankruptcy in
25 2006.

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1 Q. All right. And so Delco Products, was that one of the
2 smaller places under the banner of General Motors generally?

3 A. Well, it was a parts supplier. Did really well,
4 though. It was a big operation. I think it was over 2,000
5 employees.

6 Q. Okay. And did you -- you know where Dean worked right
7 after high school?

8 A. I did, yeah.

9 Q. Where was that?

10 A. Well, I am not exactly sure where he went straight out
11 of high school, but I do know the first job that he had that
12 was pretty substantial was working as a security guard at
13 the GM plant.

14 Q. Just to be clear, did you ever work with him there in any
15 way?

16 A. No. No, I did not.

17 Q. Okay. Now, back when y'all were young adults -- sorry.
18 Strike that.

19 After you worked at Delco for a while, what was your next
20 job?

21 A. Spent a couple -- shortly after bankruptcy, I took
22 advantage of their school reimbursement, and I worked two
23 part-time jobs there at the Wright-Patterson Air Force Base
24 mowing grass. And from then on after -- I took advantage of
25 their school, and I decided I wanted to be a police officer,

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1 and at 40 years old I went through the police academy.

2 Q. Sounds fun. Where were you a police officer?

3 A. In the City of Urbana.

4 Q. And how long were you a police officer in Urbana?

5 A. Six years.

6 Q. What did you do after you left that?

7 A. I left there and went to work for a glass company out

8 of China as a supervisor, Fuyao. Helped them incorporate

9 everything into the area, first 40 employees in the door.

10 Q. Got it. And over the course and -- sorry. And what do
11 you sort of do for work these days?

12 A. I do a home remodeling business. I own my own
13 business.

14 Q. Great. Now, over the course of those years between, say,
15 1990 and to this time, was -- have you maintained a friendship
16 with Mr. Gillispie?

17 A. To some level, yes. Whatever I could do, yes.

18 Q. Now, were there any difficulties in maintaining a
19 friendship with Mr. Gillispie during any of that period of
20 time?

21 A. Oh, absolutely, compared to my other friends, yes.

22 Q. And what was the difficulty that you had with staying
23 close with Dean as opposed to your other friends?

24 A. When he became incarcerated.

25 Q. And did you ever visit Mr. Gillispie in prison?

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1 A. I did a couple times, yes, sir.

2 Q. And did you have the opportunity to view and see how it
3 made -- what kind of impact it had on your friend?

4 A. Oh, absolutely, yes, sir.

5 Q. And what was that?

6 A. Just probably a broken person.

7 Q. Was it difficult for you to see him in that situation?

8 A. Yes.

9 Q. And why was that?

10 A. Well, you take someone that you've known and you know
11 their potential, and you kind of see that -- sorry.

12 Q. You're all right. Just take as much time as you need.
13 We're all right.

14 A. So much I want to say, but you won't understand me. It
15 was just tough seeing someone that you knew and that you had
16 hung out with so much lose that opportunity to do what I,
17 you know, what I ended up doing. Whether he ended up
18 getting married or having children like I did or whatever,
19 he did not have that opportunity.

20 Q. Thank you. Sir, just a couple more questions.

21 A. Sure.

22 Q. And I don't mean to pry or talk about -- get too
23 personal.

24 In high school and as a young adult, did you smoke?

25 A. Yes. Yes, heavily.

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1 Q. All right. And did you smoke pretty regularly?

2 A. I do not anymore. 2004 I quit.

3 Q. Congratulations.

4 A. Thank you.

5 Q. But back in the day, you were a smoker; is that right?

6 A. Correct.

7 Q. Did -- did Dean, did he like smoking?

8 A. He did not. He couldn't -- he didn't want anything to
9 do with it. He didn't like being around it.

10 Q. Did you ever ride around with Dean in his truck?

11 A. Oh, yes, sir. Yes.

12 Q. Did you ever try to smoke in his truck?

13 A. Well, I knew it wasn't allowed. So I tested the theory
14 in one of our adventures out driving around. And I was
15 headstrong, and so was he at the time. And so I got out of
16 the truck and smoked my cigarette while he drove along
17 beside me. And after I was finished with my cigarette -- we
18 live in a pretty small town. And once he picked me up after
19 that, I'm sure I didn't smoke the whole thing, but it was
20 more of a point for me to do that.

21 Q. You wanted to smoke a cigarette, and he didn't want you
22 in the truck?

23 A. That is correct.

24 Q. And you guys couldn't reach an agreement in that moment?

25 A. That is correct, yes.

1 **Q.** Those are all the questions I have. Thank you for your
2 time, Mr. Bowling.

3 THE COURT: All right. Counsel?

4 MR. McLANDRICH: No questions, Your Honor.

5 THE COURT: Counsel?

6 MR. HERMAN: No questions.

7 THE COURT: Can Mr. Bowling be excused?

8 MR. OWENS: Yes, Your Honor.

9 THE COURT: Thank you, Mr. Bowling.

10 THE WITNESS: Thank you very much.

11 THE COURT: Next witness.

12 MR. KANOVITZ: Your Honor, at this time plaintiff
13 calls Jerry Fyffe.

14 THE COURT: Counsel, for your planning purposes, as
15 soon as Mr. Fyffe is over, we're going to take a break. I'm
16 assuming that -- or we are going to take a break at a quarter
17 till 11, whichever occurs first.

18 **JERRY MICHAEL FYFFE, PLAINTIFF'S WITNESS, SWORN**

19 THE COURT: Mr. Fyffe, please try to keep your voice
20 up so we can all hear your responses to the inquiries. You
21 have a microphone there. If you get too close, it muffles
22 you; if you get too far away, it loses you. So if you keep
23 your voice up so that we can all hear you, that will help
24 solve the problem, all right?

25 THE WITNESS: Yes.

1 THE COURT: You may inquire.

2 MR. KANOVITZ: Thank you, Your Honor.

3 **DIRECT EXAMINATION**

4 BY MR. KANOVITZ:

5 Q. Good morning.

6 A. Good morning.

7 Q. Could you introduce yourself to the jury, please?

8 A. I am Jerry Michael Fyffe.

9 Q. Where are you from, Mr. Fyffe?

10 A. Sabina, Ohio.

11 Q. And is Sabina near Fairborn?

12 A. Probably about a hour, yeah.

13 Q. And are you married?

14 A. Yes, sir.

15 Q. Do you have children?

16 A. Yes, sir.

17 Q. And what do you do for a living?

18 A. Well, I'm a retired GM union representative. I farm
19 and I pastor a church.

20 Q. And what were the years you were working at GM?

21 A. I hired in in 1976, retired in 1998.

22 Q. And you mentioned that presently you are farming?

23 A. Yes, sir.

24 Q. What do you farm?

25 A. Corn and soybeans.

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1 Q. And how big is your farm?

2 A. I live on 112 acres.

3 Q. Is that -- is that located in Sabina?

4 A. Yes, sir.

5 Q. And you also mentioned you are a pastor. Could you tell
6 us about that, please?

7 A. Yeah. I was called into ministry in 1995 in Hillsboro,
8 Samantha Free Will Baptist Church, and the Lord led me to
9 start a church over by the fairgrounds in Hillsboro. And we
10 built it, and now we're up to about 150 people. And -- and
11 still there.

12 Q. Very good. Switching topics, do you know Dean Gillispie?

13 A. Yes, sir.

14 Q. And how do you know him?

15 A. I met him back when he was a -- a young guy just
16 getting out of high school. And I farmed with my dad in
17 Fairborn at that time. We lived over there. And I would
18 always go in town, me and my best friend, Dennis Fulton, and
19 eat -- on Friday night and eat our supper and stuff and just
20 kind of hang out.

21 And Dean and his buddies was over there at the gas
22 station, and we pulled in. They liked my truck. So we got
23 to talking. And next weekend got to see them again. And
24 then about every weekend we'd either go in town or they'd --
25 him and some of his buddies, Otis and them boys, would come

1 out to the farm and kind of watch us farm, and they kind of
2 had a thing of who was going to drive my big truck.

3 Q. What was it that they liked about your truck?

4 A. Oh, it was -- back in them days, it was -- I had
5 42-inch tires under it, and it was lift off the ground real
6 high. And, you know, that was the day of the Big Foot, but
7 mine was a Chevy.

8 Q. It was something that would grab people's attention?

9 A. Yeah. Oh, it would.

10 Q. And you mentioned Dean liked to come to the farm?

11 A. Yeah.

12 Q. What did he like to do when he was out at the farm?

13 A. Just watch us work or, you know, he just come out for a
14 few minutes and see what's going on. He liked the country,
15 you know. He lived in town all the time.

16 Q. Got you. And what sorts of things would you all do
17 together once you became friends?

18 A. Well, just go out to eat or just really sit many hours
19 just in the parking lot talking, uh-huh.

20 Q. Is that what kids did back then?

21 A. Yeah.

22 Q. How often would you see Dean in the time frame from when
23 you became friends with him until his conviction?

24 A. Well, if I wasn't real busy, about every weekend, yeah.

25 Q. And who were -- who all was in the friend group?

1 A. Okay. Dean's friends that I can really recall, there
2 was a group of them, and it was Dean -- we called him Spiz;
3 his dad always called him Spiz. But his -- Otis, I guess
4 his name Brian Poulter. I know he's Brian, but we called
5 him Otis. But then John Coppock and Gilbert Lures, and once
6 in a while a guy named Richie Winters would be with him, but
7 not very -- I didn't see him very often.

8 MR. KANOVITZ: Pardon me just a second.

9 BY MR. KANOVITZ:

10 Q. And were you working at GM at that time?

11 A. Yes, sir.

12 Q. And also working on the farm?

13 A. Yes, sir.

14 Q. And did your family -- did you come from a family of
15 farmers?

16 A. Yes, sir.

17 Q. And tell us about that, please.

18 A. Okay. My mom and dad moved up from Kentucky. And we
19 come up here, and Dad bought a farm. And he was a union
20 Carpenter. And he always lived on a farm, I mean.

21 Q. Is your father still living?

22 A. No, sir.

23 Q. What was his name?

24 A. Homer Fyffe.

25 Q. Thank you. And did there come a time where you bought a

1 boat?

2 A. Yeah.

3 Q. What kind of boat was it?

4 A. It was a Four Winds.

5 Q. Is that a -- is that a boat that you fish off of or ski
6 off of or --

7 A. Ski off of. You can fish off of it. We fished a few
8 times off of it, but it was really a ski boat, an open-bow
9 boat.

10 Q. Got you.

11 A. Twenty foot.

12 Q. And did you own this boat at the time that you were
13 friends with Dean?

14 A. Yeah.

15 Q. Got you. And was the boat expensive?

16 A. Yeah. Back in them days it was.

17 Q. How much did it cost?

18 A. Right around 10,000, 10 or \$12,000.

19 Q. And did the friend group like enjoying time on your boat?

20 A. Yeah.

21 Q. And did they chip in at all?

22 A. Yeah.

23 Q. Where would you all take the boat back when you were
24 friends?

25 A. Back then we went to Cave Run Lake down in Morehead,

1 Kentucky.

2 Q. What kind of lake is that?

3 A. Beautiful lake. Big, uh-huh. Lays in between all the
4 hills down there.

5 Q. So if you own a boat and you want to make use of it,
6 that's a good place to go?

7 A. Yeah. Good water, yeah.

8 Q. Got you. And how long would it take to drive down there?

9 A. About two and a half hours.

10 Q. Is that something you'd do as a day trip or something
11 where you'd spend time there?

12 A. No. We'd spend the whole weekend there.

13 Q. Got you.

14 A. Yeah.

15 Q. So if you were going to go down there with the boat,
16 you'd --

17 A. Yeah.

18 Q. -- want to be there all weekend?

19 A. Yeah.

20 Q. Got you. And how would it work? Did you all stay in
21 hotels or did you camp?

22 A. No. We camped.

23 Q. And how would it work with the camping down there?

24 A. We went to place called Twin Knobs all the time. A
25 real nice campground. And we'd pull in, and you sign in,

1 and then you -- at that time you didn't have to have
2 reservations. You'd just pull in and hunt you a spot and
3 come back up to the park ranger station and sign in and then
4 stay all weekend.

5 Q. Did you know who ran the park?

6 A. At that time the State did.

7 Q. State --

8 A. Now -- Thousand Trails runs it now.

9 Q. Got you. But the State of Kentucky ran it?

10 A. Yeah, State of Kentucky, um-hmm.

11 Q. And you mentioned you'd have to sign in?

12 A. Um-hmm.

13 Q. Would you fill out paperwork then when you signed in?

14 A. Yeah.

15 MR. KANOVITZ: Your Honor, we'd like to publish
16 Plaintiff's Exhibit 204, page 6 of 7, which was previously
17 shown to the jury.

18 THE COURT: It may be.

19 (Exhibit displayed).

20 BY MR. KANOVITZ:

21 Q. Sir, if you could take a look at Plaintiff's Exhibit 204,
22 page 6 of 7. We will enlarge it here.

23 Do you recognize maybe not that document but documents of
24 that type?

25 A. Yeah.

1 Q. And is this what you would fill out when you would go to
2 the lake?

3 A. Yes, sir.

4 Q. And when you all would go to the lake, who would take
5 responsibility for paying for the campsite?

6 A. Me.

7 Q. Why is that?

8 A. Because I was driver.

9 Q. Got it. And so -- yeah. So in terms of getting the boat
10 down there, did you need a hitch?

11 A. Yeah.

12 Q. And did you have a hitch on your truck?

13 A. Yeah.

14 Q. And when you would -- when you went to campsites, did
15 everybody pitch in?

16 A. Yep.

17 Q. You weren't just hosting them down there?

18 A. No.

19 Q. But you'd be the one that would sign for it?

20 A. (Nodded head.)

21 MR. KANOVITZ: You can take it down.

22 BY MR. KANOVITZ:

23 Q. And when you all were down at the campsites, what would
24 you like to do?

25 A. Boat ride, water-ski, and go into town and eat.

1 Q. And did Dean like to suntan?

2 A. No. He'd burn up. We'd all make fun of him because,
3 you know, I am all dark complected from farming and stuff.
4 And he is so white he always wore his shirt. And we'd make
5 fun of him because he'd burn and look like a big lobster.

6 Q. So even when you were out on the boat or in the big lake?

7 A. (Nodded head.)

8 Q. Would he swim in the shirt?

9 A. All the time.

10 Q. And when he wasn't in the lake, just describe for the
11 jury how Dean would usually dress back in that time frame when
12 you knew him.

13 A. Just either wear a button-up shirt and jeans, and
14 that's it.

15 Q. And did you ever see him wearing fancy jewelry or
16 anything like that?

17 A. No.

18 Q. Did Dean ever dye his hair as far as you knew?

19 A. No.

20 Q. And was Dean a smoker?

21 A. No.

22 Q. In fact, was he anti-smoking?

23 A. Bad. He -- he had a little red Chevy truck, bought it
24 brand new, and he had a sign on the dashboard, "No Smoking."
25 And he couldn't get around smoking.

1 Q. Did you ever try to smoke in his car?

2 A. I've never smoked in my life, a day in my life.

3 Q. Okay. So you all have that in common?

4 A. Yeah.

5 Q. And I think you mentioned when you would go down to the
6 lake you would stay the weekend?

7 A. Yes, sir.

8 Q. About what time would you all usually leave?

9 A. Well, I worked third shift, and we'd usually leave
10 midafternoon on Friday, yeah.

11 Q. And then what time would you leave the lake?

12 A. Oh, down there?

13 Q. Yeah.

14 A. 4 or 5 o'clock in the evening, on Sunday evening.

15 Q. And why would you leave around then?

16 A. Well, because I worked third shift at General Motors,
17 and I had to be to work at 11.

18 Q. Got you. Switching topics, did your dad keep a calendar,
19 Homer keep a calendar?

20 A. Yes.

21 MR. KANOVITZ: And, Your Honor, could we publish
22 Plaintiff's Exhibit 54, page 7?

23 THE COURT: That's been previously published?

24 MR. McLANDRICH: Previously published?

25 MR. KANOVITZ: I don't believe it has been

1 previously published.

2 I apologize. Yes, it has.

3 MR. McLANDRICH: It has.

4 THE COURT: Okay. It may be.

5 MR. KANOVITZ: Thank you.

6 (Exhibit displayed.)

7 BY MR. KANOVITZ:

8 Q. Sir, taking a look at this, do you recognize that this is
9 a calendar page for June of 1988?

10 A. Yes, sir.

11 Q. And fair to say there is not that many entries on here,
12 right?

13 A. Right.

14 MR. KANOVITZ: Could you zoom in on Tuesday, the
15 7th, please.

16 THE WITNESS: Yeah.

17 BY MR. KANOVITZ:

18 Q. Just a moment.

19 Can you tell us what's written in the entry for Tuesday,
20 the 7th?

21 A. "Soybeans."

22 Q. Does that appear to be your dad's handwriting?

23 A. It is his handwriting.

24 Q. And if you're a farmer back in that time frame, why would
25 you write "soybeans" on a particular day and a particular

1 month?

2 A. Well, we got to keep track of when we plant our crops,
3 know what field they are in. And like if you got crop
4 insurance or anything through the FSA office, you have to
5 report a planting date. And then when you harvest, you give
6 your report of your bushel per acre for, you know,
7 government subsidize and stuff like that for crop insurance.

8 Q. Knowing the way your dad conducted himself usually on a
9 daily basis, was there any reason that you could think of why
10 he would fill out every day in the calendar?

11 A. No. He is a pretty simple man. He very -- if you
12 notice how he spelled beans, my dad only had an eighth grade
13 education, but he was a very smart man.

14 MR. KANOVITZ: Could we go to the 29th.

15 (Exhibit displayed.)

16 BY MR. KANOVITZ:

17 Q. And, sir, showing you the 29th, does that appear to be
18 your mom's handwriting?

19 A. Yep.

20 Q. And the 29th and the 30th -- actually, you see there it
21 says "Florida vacation"?

22 A. Sure is.

23 Q. And you got the -- or the 29th and the 30th is circled.
24 Yeah?

25 A. Yes.

1 MR. KANOVITZ: And could we go to page 9 of 85,
2 please. And could we just blow up the three days, 18th
3 through the 20th, please.

4 (Exhibit displayed.)

5 BY MR. KANOVITZ:

6 **Q.** All right, sir, showing you 18, 19, and 20 for the page
7 August 1988, can you tell us what is written on the 18th
8 there?

9 **A.** Okay. "Gale pups. Call insurance office and check."
10 And then "Nell's pups."

11 **Q.** What does "Gale pups" mean?

12 **A.** My dad raised foxhounds. You all probably don't know
13 what that is, but he liked running fox. And he'd go down in
14 Kentucky all the time, where we're from, and there was a fox
15 pen down there, and it was all fenced in. They'd let their
16 dogs run all night.

17 But he raised pups all the time, and it was real hot
18 that week. And he marked on the calendar "Gale pups," and
19 Nell had pups that week, and he put them down in my
20 basement.

21 **Q.** Got you. So he had two dogs that both had pups that
22 week?

23 **A.** Oh, yeah. He had about 12 dogs.

24 **Q.** And fast forwarding, did there come a time when you found
25 out that Dean had been arrested?

1 A. Yeah.

2 Q. And what did you do after you found out?

3 A. What'd I do?

4 Q. Yeah.

5 A. Wasn't nothing I could do. I mean, just, I couldn't
6 believe it.

7 Q. Did there come a time where you found out like what dates
8 he was alleged to have committed crimes on?

9 A. Yeah. Then we started putting -- me and Dad and my mom
10 started putting our dates together, and we said, there ain't
11 no way. I said, "He was with us," you know. He was with me
12 in Kentucky.

13 Q. So you found the calendar, and you saw the pups notation
14 on there?

15 A. Yeah.

16 Q. And did that cause you to remember that you were with
17 Dean on that weekend?

18 A. Yes.

19 Q. Can you explain why?

20 A. Well, 'cause it was real hot that weekend, and I knew
21 we went to Kentucky. And so Dad had the dates wrote down.
22 And he said, "Well, Spiz couldn't have done that." He said,
23 "My dogs had these pups and when you guys got home, I put
24 them down in your basement."

25 Q. And do you visually remember that happening?

1 A. Oh, yeah.

2 Q. And did you supply that information for Dean's defense?

3 A. Yes.

4 Q. And did you testify at his criminal trial about it?

5 A. Yes, sir.

6 Q. Do you recall if you testified at two trials?

7 A. Yeah.

8 Q. And did there come a time that you found out Dean got
9 convicted?

10 A. Um-hmm.

11 Q. And was that surprising to you?

12 A. Very.

13 Q. And what were your thoughts about that?

14 A. I was really sad, 'cause I was raised in our judicial
15 system that, you know, hey, you're always innocent till
16 proven guilty. My dad was a true-born American, and so I
17 still am, and I still believe in our system. But that day
18 then, it about shot everything. I mean, it was, to us,
19 excuse me, it was a joke. It really was. And I thought,
20 there ain't no way, way they described Dean. And I set
21 there and heard everything. The way they described him and
22 everything.

23 And I guess I was raised with four sisters, and if
24 somebody would ever rape one of them, they'd be devastated.
25 And I sat right there in that courtroom and watched them

1 girls --

2 THE COURT: Counsel.

3 MR. McLANDRICH: Objection.

4 THE WITNESS: Excuse me. I'm sorry.

5 THE COURT: He's answered the question. And I've
6 allowed a lot of flexibility here.

7 THE WITNESS: Oh, I'm sorry.

8 MR. KANOVITZ: Yes, Judge. Thank you.

9 BY MR. KANOVITZ:

10 Q. Okay. Fast forwarding, sir, what's your relationship
11 like with Dean in this day and age?

12 A. Good friends.

13 Q. Do you see him very often?

14 A. Then or now?

15 Q. Now.

16 A. No, I don't ever get to see him. I moved away from
17 Fairborn, and I don't hardly ever get to see him at all.

18 Q. When's the last time you saw him?

19 A. Him and his father drove down to my farm, and right
20 after he got out of prison, they come down and visit me.

21 Q. So that would have been back in like early 2018s?

22 A. Yeah.

23 Q. And do you have any reason to lie for Dean?

24 A. No, sir.

25 Q. Did you have any reason to lie for Dean back when you

1 testified during --

2 A. No, sir.

3 Q. -- the trials?

4 MR. KANOVITZ: Okay. I have no further questions.

5 THE COURT: Any cross?

6 MR. McLANDRICH: Just a couple of questions.

7 THE COURT: All right.

8 **CROSS-EXAMINATION**

9 BY MR. McLANDRICH:

10 Q. Good morning, Mr. Fyffe.

11 A. Good morning.

12 Q. I am John McLandrich. I represent Officer Moore.

13 So you did, in fact, testify at the two criminal trials.

14 I think you have already said that, right?

15 A. Um-hmm.

16 Q. All right. And when y'all would go down to Kentucky, I
17 believe that you had testified at the criminal case you would
18 go to Cave -- Cave Lake, but there were times when you would
19 also camp at campsites at Cave Lake or thereabouts where you
20 didn't have to register with the ranger station. Is that --

21 A. Yeah. If Cave Run -- that was called Twin Knobs. If
22 it was full, you go over there to Zilpo, and you didn't have
23 to register there.

24 Q. And so if you went to Zilpo, there wouldn't be any
25 receipts like we saw previously?

1 A. Not as I know of.

2 Q. And when you worked at GM, were you always on third shift
3 or did you rotate?

4 A. I'd rotate. Well, I was always on third, but when I
5 hired in, I hired in on second. And then I went to third,
6 and then I went to day for a little while, but third shift
7 most of my whole career.

8 Q. And do you recall whether in the August of '88 time frame
9 you were on third shift?

10 A. Yes, sir.

11 Q. And I seem to recall from the criminal trial testimony
12 that some weekends you would have to work?

13 A. Yes, sir.

14 Q. And were you ever asked about your work schedule back in
15 the time of the criminal trial? In other words, to establish
16 whether you were or weren't working that particular weekend of
17 that August 20 date?

18 A. No.

19 Q. And you said you would normally leave Kentucky about 4 or
20 5 on the Sunday to get back?

21 A. Um-hmm.

22 Q. And so sounds like you'd get back like what, 6:30, 7
23 o'clock?

24 A. About, yeah.

25 Q. And I think you'd also testified at the criminal trial

1 that without the calendar wouldn't have been able to say where
2 you were on that particular August 20th weekend, correct?

3 A. Oh, I -- I knew where I was, 'cause I had, you know,
4 where I signed in. It was fresh in my mind then. And I
5 knew exactly where I was. 'Cause, see, when I was a union
6 representative and I had to account for all my time, 'cause
7 I was in charge of 300-some guys. And so we'd even, like
8 during July, if they shut down, I would take off, and a lot
9 of times that would be our vacation. I'd go down there to
10 the lake for a week.

11 Q. And I understand what you've just said, but you said
12 something about you had -- did you have to sign in as a union
13 rep?

14 A. No. I clocked in.

15 Q. But you said something about you knew where you were
16 'cause you had to sign in.

17 A. No. 'Cause I clocked in. Well, I call it sign in.
18 Clock in at work.

19 Q. All right. But you don't believe you clocked in for
20 that --

21 A. Oh, no, sir.

22 Q. Okay. But the way you were able to remember where you
23 were on that August 20th weekend was because of your father's
24 calendar?

25 A. Well, that helped. I mean, you know, this long a

1 period. But at that time when he was arrested, I knew
2 exactly where we was at 'cause, you know, that was our
3 really only thing we done.

4 **Q.** Now, I believe at the criminal trial you had testified
5 that the way you were able to recall and the only way you were
6 able to recall it was because of the calendar?

7 **A.** That's not the only way I remember, I mean. You know,
8 that refreshed my memory.

9 MR. McLANDRICH: Why don't we bring up, this is, I
10 believe, PX, Plaintiff's Exhibit 5. And it's page 95 of the
11 document or 493, 494 of the transcript.

12 MR. KANOVITZ: I'm sorry, counsel. Which page?

13 MR. McLANDRICH: So of the document, it's page 95.
14 In the transcript, it's 93 -- 493, 494.

15 MR. KANOVITZ: Did you mean PX 5?

16 MR. McLANDRICH: Yes.

17 MR. KANOVITZ: Page?

18 MR. McLANDRICH: 95.

19 MR. KANOVITZ: Thank you. Okay, thank you.

20 BY MR. McLANDRICH:

21 **Q.** Just a moment while we bring it up, please. Thank you.

22 (Exhibit displayed.)

23 BY MR. McLANDRICH:

24 **Q.** So you'll see on this portion of the criminal trial
25 transcript starting at line 4, you were asked, "And could you

1 tell us, Jerry, whether or not when you were asked if you
2 remembered where Dean was earlier, whether you were able to
3 put this all together without looking at the calendar?"

4 And then your answer was, "When I was first asked, no, I
5 wasn't. You know, you asked me what happened two years ago to
6 the day I couldn't tell you, but when we started looking back
7 through our books and Dad found his calendar, then it hit us,
8 just like that, I knew exactly where we were."

9 MR. KANOVITZ: Objection; not impeaching.

10 THE COURT: What?

11 MR. KANOVITZ: I am objecting as not impeaching.

12 THE COURT: What's your next question?

13 BY MR. McLANDRICH:

14 Q. Well, the question is, you had testified that you had an
15 independent memory of being in Kentucky, but back at the time
16 of the criminal trial, apparently, you didn't have an
17 independent memory of being in Kentucky. You were able to
18 refresh that memory by reviewing your father's calendar,
19 correct?

20 THE COURT: I am going to overrule the objection. I
21 understand the confusion. I mean, I guess there could be a
22 little difference there. I'm going to let him answer.

23 MR. McLANDRICH: Thank you.

24 THE WITNESS: You know, on something that serious, I
25 wanted to make sure, without a shadow of doubt, I wanted to

1 make sure where Dean was. You know, I wouldn't want no
2 confusion or anything 'cause, you know, that's a bad thing to
3 any poor lady, and I wanted to make sure. And then when I
4 looked at that, I knew exactly. And I probably did answer
5 like that. I'm sorry. I probably did answer that way.

6 BY MR. McLANDRICH:

7 Q. I understand. It's long time ago to remember.

8 A. Yes, it is.

9 Q. I understand completely.

10 I think that's all I have for you, thank you, sir.

11 A. Thank you, sir.

12 Q. Nice meeting you.

13 THE COURT: Any other questions?

14 MR. KANOVITZ: Nothing further from plaintiff.

15 THE COURT: Can the witness be excused?

16 MR. KANOVITZ: Yes.

17 THE COURT: Counsel?

18 MR. McLANDRICH: Yes, sir.

19 THE COURT: Thank you, sir.

20 THE WITNESS: Thank you, sir.

21 THE COURT: Ladies and gentlemen, we're going to
22 take a break. We'll take our normal break. I know we're a
23 little later, but we'll take a normal break, but then we are
24 going to recess for the lunch hour right at noon. Thank you.

25 THE COURTROOM DEPUTY: All rise. This court stands

1 in recess.

2 (Jury out at 10:51 a.m.)

3 (Recess at 10:52 a.m.)

4 (Jury in at 11:08 a.m.)

5 (In open court at 11:08 a.m.)

6 THE COURT: Counsel approach.

7 (At sidebar off the record.)

8 THE COURT: We are back on the record. Counsel
9 ready to proceed?

10 MR. OWENS: Your Honor, the next witness on behalf
11 of plaintiff is Dr. Jennifer Dysart.

12 THE COURT: All right. Counsel ready to proceed?

13 MR. McLANDRICH: Yes, sir.

14 MS. FRICK: Yes.

15 **JENNIFER DYSART, PLAINTIFF'S WITNESS, SWORN**

16 THE COURT: Doctor, please try to keep your voice up
17 so that we can all hear your responses. We have the
18 microphone there for you. If it gets too close, it muffles
19 you; if it gets too far away, it won't pick you up. So if you
20 can keep your voice up, that solves the problem, all right?

21 THE WITNESS: No problem.

22 THE COURT: You may inquire.

23 THE WITNESS: Quick question. Does the seat go up
24 and down? My feet aren't touching the floor.

25 THE COURT: I have no idea.

1 You may inquire.

2 MR. OWENS: Thank you, Your Honor.

3 **DIRECT EXAMINATION**

4 BY MR. OWENS:

5 **Q.** Good morning, Dr. Dysart.

6 **A.** Good morning.

7 **Q.** Could you just introduce yourself to the jury?

8 **A.** Yes. My name is Jennifer Dysart. I am a psychology
9 professor at John Jay College of Criminal Justice in New
10 York City.

11 **Q.** And what do you do or study as a psychology professor at
12 John Jay?

13 **A.** Yes. So I study eyewitness memory and eyewitness
14 identification, and I have since my undergraduate honors
15 thesis in 1997.

16 **Q.** And how long have you been a professor at John Jay?

17 **A.** For 16 years, since 2006.

18 **Q.** And, I guess sort of, what are your main job -- what does
19 your job involve, I guess, outside of teaching students?

20 **A.** Yes. It's a very typical professor job, where we -- or
21 I -- advise students on thesis projects. I serve on
22 committees. We teach, do research, publish. All those
23 aspects are part of the job.

24 **Q.** And is the professor -- are you a tenured professor at
25 John Jay?

1 A. Yes.

2 Q. And when did you get your tenure there?

3 A. When I was hired. Very -- yes. In 2006.

4 Q. And I know you said your job, you work as a professor,
5 but do you also do work outside of that of being a professor?

6 A. Yes, I do.

7 Q. And what kind of work is that?

8 A. Well, I volunteer to give lectures. I sit on
9 committees. For example, I was on the Third Circuit
10 committee that looked at making recommendations for
11 eyewitness identification procedures. So I still sit on an
12 advisory board for that committee in the Third Circuit. And
13 I also work as a consultant expert witness.

14 Q. And are you here today as a consultant expert witness?

15 A. Yes, I am.

16 Q. And I know you probably enjoyed traveling to Dayton from
17 New York, but are you being paid to provide opinions and
18 testimony in this case?

19 A. Yes, my typical rate.

20 Q. And you beat me to the punch. Are you charging
21 Mr. Gillispie a different rate than you would charge other
22 people for your consultant work?

23 A. No.

24 Q. And about what percentage of your overall work involves
25 being a consultant as opposed to being a professor?

1 **A.** Very little of my work is being a consultant. So, yes.
2 We have -- we have contractual limitations of how much we
3 can be working outside of the college. So it's not a -- not
4 a huge part of my life.

5 **Q.** And you mentioned a moment ago that one of the things
6 that you do as a professor is publish papers; is that right?

7 **A.** Yes.

8 **Q.** Now, in the field of psychology, can you just describe a
9 little bit about your field more specifically?

10 **A.** Yes. So the field of eyewitness identification, and
11 it's part of what we call forensic psychology, and other
12 people call it psychology in the law, forensic psychology.
13 I think the term "forensic" became really popular in recent
14 years. So we are often referred to as forensic
15 psychologists. But it really involves people who have
16 backgrounds in what we call the core areas of psychology.
17 So we might have clinical psychologists who are also
18 eyewitness researchers.

19 I'm a social psychologist who does eyewitness research.
20 So I am very interested in human behavior and how our
21 interactions with other people can influence, you know, how
22 we behave in decisions we make.

23 And then others are cognitive psychologists, who are
24 primarily concerned about the brain and the memory of the
25 eyewitness.

1 But as eyewitness experts, we are all somewhat familiar
2 with, you know, the various subfields of psychology.

3 Q. And can you just describe your educational background in
4 this field?

5 A. Yes. I have my bachelor's degree from St. Thomas
6 University in Canada. I come from eastern Canada. And then
7 my master's is in brain behavior and cognitive science. And
8 then my Ph.D. is in social psychology. And I received those
9 two degrees in Ontario, where I studied.

10 Q. And when did you finish your Ph.D.?

11 A. In 2004, I believe. 2004.

12 Q. It's been some time.

13 A. It has.

14 Q. And so as a social psychologist, you publish articles.
15 Are they subject to any kind of review before they're
16 published, or did you just write it and send it out?

17 A. Yes, they are subject to what we call peer review. And
18 that is when other experts in the field, when you submit
19 your manuscript to be published, other experts read it over.
20 And it's a blind process. So they don't know your name;
21 they don't know who they are reviewing the article for, who
22 the authors are. And then they will provide the editor of
23 the journal with their decision as to whether they think
24 this is psychologically and empirically sound, good
25 research, good study, and they will make a recommendation

1 for publication or rejection.

2 Q. And have you published peer review articles in the field
3 of -- in social psychology and, more specifically, about
4 eyewitness identifications?

5 A. Yes.

6 Q. And can you just describe some of the papers that you
7 published that might pertain to the issues in this case?

8 A. Yes. So I have published work on -- generally, it's on
9 police procedures, and so one study I published was on
10 something called double-blind administration. And that is
11 when the person, the police officer or person who is showing
12 the photographs or doing the lineup procedure with the
13 witness, when they do not know who the suspect is.

14 So what we're looking at there is to see -- you know,
15 as a social psychologist, I am looking at influence, and so
16 we are looking to see whether that person who's just
17 administering the lineup can cause differences, like make
18 people change their mind, cause them to be more confident in
19 their identification. So that's one publication.

20 And others that I've looked at are the various types of
21 photo arrays and lineups that law enforcement can use when
22 they are trying to test a witness on their memory. So I
23 published some work on that as well.

24 Q. Can you just -- so one of the papers I have on your list
25 of many is called *Repeated Eyewitness Identification*

1 *Procedures*, with the same subject, published in the *Journal of*
2 *Applied Research in Memory and Cognition*.

3 First question is, is the *Journal of Applied Research in*
4 *Memory and Cognition*, is that one of these peer-reviewed
5 journals that you have described?

6 A. Yes, it is.

7 Q. And can you just -- without getting into the nitty-gritty
8 because we will do that a little bit later -- just describe
9 what that paper was about?

10 A. Yes. It was an article that I published with my
11 colleague, Nancy Steblay, from Minnesota. She -- what we
12 essentially did was lay out for the very first time this
13 idea that researchers have been talking about for a long
14 time but had never published on, and that is that it's very
15 dangerous for witnesses to be shown the same suspect
16 multiple times for the purposes of identification.

17 And so we explain kind of generally why that's a
18 problem, because the eyewitness, when they see a person in
19 one context and then they see them again later, sometimes we
20 have difficulty remembering, like, Why is that face familiar
21 to me? Right, you see someone at the grocery store and you
22 think, How do I know that person? That was the general idea
23 behind telling law enforcement and prosecutors and defense
24 attorneys to be extremely cautious in cases where the
25 witness has viewed the suspect on multiple times.

1 Q. And I'm not going to go through all of your papers that
2 you published, but I just want to ask you about one more. Did
3 you publish a paper in 2003 with some other scholars called
4 *Eyewitness Accuracy Rates in Police Showup and Lineup*
5 *Presentations: A Meta-Analytic Comparison*, in the *Journal of*
6 *Law and Human Behavior*?

7 A. Yes, I did.

8 Q. And before I ask you the same thing as last time, is *Law*
9 *and Human Behavior*, is that one of these peer-reviewed
10 articles or publications that you've described?

11 A. Yes.

12 Q. And can you sort of, without going into too much detail,
13 just describe what that paper was about?

14 A. Yes. So a meta-analysis is a paper or a study where
15 the researchers don't actually collect any new information,
16 like new data. Instead, what we do is we go out into the
17 field and we look at all of the research that has already
18 been published or already been conducted on a particular
19 topic.

20 And then what we do is we get all of that data together
21 and we look for, like, patterns, like typically we can look
22 at overall what happens; as opposed to a specific study
23 which might be nuanced. It might have, you know, a very
24 specific thing that they are looking at. A meta-analysis
25 tells us, wow, over thousands and thousands of participants,

1 what do we expect to see when certain procedures are used.

2 Q. And have you published any chapters in any books in your
3 field?

4 A. Yes, I have.

5 Q. And have you been qualified to testify an expert in state
6 or federal courts --

7 A. Yes.

8 Q. -- in the U.S.?

9 A. Yes, I have.

10 Q. I am not -- I don't want to hold you to it, but how many
11 times have you been qualified to testify as an expert in
12 federal and state courts?

13 A. I think about 85 times probably, in 15 years, 16 years.

14 MR. OWENS: Your Honor, at this time I'd move to
15 have Dr. Dysart qualified as an expert to opine on the field
16 of eyewitness identification and social psychology.

17 MR. McLANDRICH: No objection.

18 THE COURT: All right. She will be qualified to
19 testify within those parameters.

20 MR. OWENS: Thank you, Your Honor.

21 BY MR. OWENS:

22 Q. So before we move on from your sort of background in all
23 this academic stuff, can you just tell us how you got into
24 this field of studying eyewitness identification and police
25 procedures and stuff like that?

1 **A.** Yes. When I was an undergraduate student, I went to a
2 small liberal arts college, and I had the most amazing
3 professor. And he happened to study face memory. And he
4 was a cognitive psychologist, and so a lot of his work was
5 on what we will call facial recognition studies. So if you
6 were a participant in those studies, he would show you 50
7 faces and then give you a little break, and then he would
8 show you a hundred faces. And he'd ask you, which ones are
9 new that I didn't show you -- that you hadn't seen before
10 and which ones are old. And so that's what the participants
11 would do. And it's really studying kind of theoretical ways
12 of how the mind works.

13 And I thought that was interesting, but I was very -- I
14 was much more interested in doing applied work. I thought,
15 how is this going to help anyone to know these things. And
16 so I asked him if I could work with him, but I wanted to
17 take face memory and make it more applied. And he said,
18 okay, go see what you can find.

19 So I went to the library, and I found the field of
20 eyewitness identification. And so I did my undergraduate
21 honors thesis with him, and then continued -- I was just in
22 love with the research, in love with the field, and so I
23 continued my education studying with one of the leading
24 researchers on identification procedures in Canada at the
25 time, and conducted my masters and Ph.D. work with him.

1 Q. And have you continued to focus on ways to apply your
2 work with people, members of the criminal justice system in
3 the United States since you've become a professor?

4 A. Yes. A big part of my job is education, and so I'm
5 often asked to give educational seminars to people in the
6 criminal justice system -- judges, prosecutors, police,
7 defense attorneys, even the general public. Sometimes
8 universities will ask me to come in. And so I volunteer my
9 time, and I go in and I provide kind of an educational
10 seminar.

11 And the interesting thing is it's the same talk no
12 matter the audience because the science is the science.

13 Q. And so I just want to break that down a little bit. You
14 said you give presentations to judges?

15 A. Yes.

16 Q. And would that be in state and federal courts?

17 A. Yes.

18 Q. And how many times have you given presentations to judges
19 about eyewitness identification issues?

20 A. Over 30 times.

21 Q. Did you say that you also give presentations to
22 prosecutors?

23 A. Yes.

24 Q. And do you have a rough estimate about how many times you
25 have given presentations on eyewitness identification issues

1 to prosecutors?

2 A. I have a rough idea, but it's in my -- it's in my CV.
3 Most recently, it's been with conviction review and
4 conviction integrity units within prosecutors' offices.
5 Maybe ten. I'd have to take a look at the numbers.

6 Q. All right. We won't hold you to the numbers. But have
7 you also given presentations to law enforcement and police
8 agencies?

9 A. Yes. Yes, I have.

10 Q. And have those presentations been around the country in
11 jurisdictions big and small?

12 A. Yes, they have.

13 Q. Can you just give a couple examples?

14 A. Las Vegas; I lectured in the Michigan chiefs of police
15 associations, all the chiefs from all over Michigan; in West
16 Virginia; New York; all over.

17 Q. So why is it that these trainings are even necessary or
18 relevant if you are giving the same talk to these different
19 audiences?

20 A. It's my opinion that judges, prosecutors, police want
21 to get things right. They want to avoid wrongful
22 convictions, and they want to make sure that the true
23 perpetrator is found guilty and held accountable for their
24 actions.

25 And I have knowledge and experience that can help them

1 make those decisions to avoid those wrongful convictions.

2 Q. Well, and regardless of any convictions, have there been
3 mistakes made in terms of eyewitnesses in actual -- in
4 criminal prosecutions?

5 A. Yes, there have.

6 Q. And so how do researchers in your field -- has there been
7 theoretical research into the potential for eyewitness
8 mistakes?

9 A. Yes. In our laboratory research, certainly that's one
10 of the things that we're looking at, where we can look at
11 how often do eyewitnesses make mistakes in our laboratory
12 research. But we also take that outside of the laboratory
13 and work with actual witnesses and police departments as
14 well.

15 Q. And in your report, you decide -- excuse me -- described
16 doing archival studies where they revealed some errors in
17 eyewitness identifications. Can you just describe that?

18 A. Sure. So the archival studies in our field, what we do
19 is we work with police, and they kind of open their doors
20 and allow us to go in and look at cases that are already
21 finished. So no ongoing cases. And what we can do is we
22 can look at how often are witnesses being asked to view
23 photo arrays, we can look at what types of decisions do they
24 make: Do they pick the suspect? How often? Do they pick
25 one of the other people in the lineup -- we call them

1 fill-ins, stand-ins -- or do they say, No, I don't recognize
2 the person here at all? So how often does that happen?

3 And the only way to know how often that happens in the
4 real world is to work with law enforcement to be able to
5 answer those, those questions.

6 **Q.** So are there -- have there been, at least focusing on the
7 archival studies, have there been -- are there any errors that
8 have been noticed?

9 **A.** (Nodded head.)

10 **Q.** Can you give us like a sense of some rate of some errors
11 in these studies?

12 **A.** Sure. Over time there have been a whole bunch of
13 studies that have been conducted by police, and so there's
14 thousands of participants who were actual witnesses in real
15 cases that have been studied. And what we find is that when
16 eyewitnesses in actual cases are shown a photo array, they
17 end up choosing from that array less than half of the time.
18 So more than half of the time they say, no, I don't see the
19 person here.

20 But when an eyewitness selects someone from the
21 identification procedure and says, you know, that's the
22 person I recognize, that's him, whatever their decision is,
23 what we know is that they are wrong and pick one of those
24 innocent fillers about a third of the time. So three out of
25 ten witnesses who are making positive identifications in

1 cases are incorrect and making mistakes.

2 **Q.** So is the -- so that these kind of mistakes that you have
3 seen in archival studies, does that research play out in other
4 places where you can study whether or not there is error rates
5 and mistake in identifications?

6 **A.** Yes. Well, there are different types of archival
7 studies. So the ones I just described were when we worked
8 with law enforcement and, you know, they show us their
9 records and we can write down the data.

10 But the second group of actual cases that we look at
11 are DNA exoneration cases in the United States. So these
12 are people who were convicted, and DNA testing after their
13 conviction has proven that they were innocent of the crime,
14 that they did not commit the crime. And so we can look at
15 those as well to see whether or not eyewitness
16 identification played any role in those cases.

17 **Q.** And so has there been, sort of for lack of a better word,
18 a well-cited study analyzing DNA exoneration cases to examine
19 rates or mistakes in the criminal justice system?

20 **A.** Yes. There was a book in 2011, so just over ten years
21 ago, that was published on the first 250 DNA exoneration
22 cases in the United States. There are now 375 or more DNA
23 exoneration cases. But a law professor named Brandon
24 Garrett looked at the first 250 cases and analyzed what
25 happened. His book is actually called *Convicting the*

1 *Innocent: Where Criminal Prosecutions Go Wrong.* That's the
2 byline on his book.

3 **Q.** And just to be fair to Mr. Garrett, that book covers a
4 number of different issues beyond eyewitness identifications,
5 right?

6 **A.** Oh, yes. He looked at, like, everything that happened
7 in those criminal prosecutions to make an assessment from,
8 in his opinion, what the issues were, hopefully that we
9 could use that information to make changes in the system.

10 **Q.** So some of the cases discussed in his book involve false
11 confessions, some of them involve faulty science, and then
12 some of them involve identification -- misidentifications,
13 right?

14 **A.** Yes. Three-quarters of them actually had mistaken
15 identification. So he found, in the first 250 DNA
16 exoneration cases, 76 percent of those cases involved
17 eyewitness testimony. So it was the leading -- it far
18 outweighed all the other factors in the case, in terms of
19 frequency.

20 **Q.** And then do some of these cases of mistaken
21 identification, do they happen in situations even when there
22 are multiple witnesses identifying the same wrong person?

23 **A.** Yes. According to Mr. Garrett's analysis, what he
24 found when he looked at the eyewitness cases, one third of
25 those cases had more than one eyewitness. So, specifically,

1 36 percent of the eyewitness cases had two, three, four, or
2 more cases -- eyewitnesses. I think one case had five
3 eyewitnesses that all mistakenly identified the innocent
4 defendant.

5 **Q.** And so how do researchers in your field use this kind of
6 data, whether it's from archival studies or the study like
7 Brandon Garrett, to examine cases across the field even if
8 there is no DNA?

9 **A.** Yes. Well, DNA is extremely rare in criminal
10 prosecutions across the United States. And we can look at
11 the evidence. We can look at the case without knowing
12 whether or not there is biological evidence that happened to
13 be at the crime scene. So that's not for our purposes
14 necessarily something relevant when we're examining the
15 police procedures, the eyewitness conditions that kind of
16 led to those wrongful selections.

17 **Q.** So I guess let me ask it differently. Did the eyewitness
18 identification issues and risks of misidentification apply as
19 equally in a case where there was DNA as they would in a case
20 involving -- not involving DNA?

21 **A.** Yes. The presence of DNA or not does not impact the
22 eyewitness identification accuracy. The only difference is
23 that DNA testing will tell us conclusively about the mistake
24 or not. But it does not tell us about -- it's not -- all of
25 this is not just relevant to eyewitness cases where there's

1 DNA.

2 Q. Now, you're here as an expert today, and I just want to
3 make this really clear. Are you here to provide the testimony
4 about the credibility of any witness in this case?

5 A. No.

6 Q. Are you here to provide any testimony about the
7 credibility, personal credibility of Detective Moore, for
8 example?

9 A. No.

10 Q. Are you here to provide any testimony about any of the
11 witnesses who made identifications?

12 A. No.

13 Q. Can witnesses be mistaken in their identifications even
14 if they are well-meaning?

15 A. Yes. That's the norm. The expected norm is that they
16 are well-meaning and they are just mistaken.

17 Q. And I am going to ask you some hypothetical questions
18 today about some of the issues that you've -- some of the
19 issues in your field. And I just want to be really clear. In
20 answering any of my hypothetical questions, are you telling
21 the jury here who to believe or what to think about the
22 evidence in this case?

23 A. No.

24 Q. In answering any of my hypothetical questions in this
25 case, are you telling this jury what to decide about any issue

1 or fact?

2 A. No.

3 Q. Okay. Let's start with one part of your report and our
4 first hypothetical. So if you made an assumption that a
5 person is innocent, what are the probabilities that somebody
6 would be selected as the perpetrator by three separate
7 eyewitnesses absent some suggestion or bias in the
8 administration or the identification procedures?

9 A. It would -- it would be extremely unlikely that three
10 separate eyewitnesses would all make the same mistake and
11 choose someone under those conditions, yeah.

12 Q. And what is the basis for that opinion that you think
13 would be extremely unlikely?

14 A. The basis is the research, decades of research that
15 inform us about the probabilities of these kinds of
16 behaviors and choices by witnesses.

17 Q. All right. And I don't have the biggest vocabulary, but
18 I am going to try to help us get on the same page.

19 In your field, do researchers have certain terminology
20 that they use for describing the factors that can contribute
21 to the accuracy of a given witness identification?

22 A. Yes, we do.

23 Q. And what are those -- what's that terminology?

24 A. Sure. So researchers talk about kind of two buckets of
25 factors that can contribute to mistaken identifications.

1 The first is what we call estimator variables, and
2 those are all of the things that are related to the crime
3 and the witness and the perpetrator, so the things that
4 happen related to the event and the crime itself.

5 And then we have system variables, and these are
6 choices that law enforcement make when they are collecting
7 the evidence from the eyewitness. So what type of questions
8 are you going to ask? What kind of photographs are you
9 going to show? When are you going to show them? Who's
10 going to show them? So every step of the investigation that
11 requires some choice about identification procedures, we
12 call them system variables, for criminal justice system
13 variables.

14 **Q.** Got it. So if I can summarize, on one side you have
15 estimator variabilities. Those are the things that happened
16 in the moment, during an incident; is that right?

17 **A.** That's correct.

18 **Q.** And then on the system side, we have things that happened
19 afterwards, when the -- in the aftermath, for lack of a better
20 word, where we start to develop identification procedures; is
21 that right?

22 **A.** That's right.

23 **Q.** Okay. Now, is this system variable versus estimator
24 variable thing, is this a brand new thing that y'all just made
25 up in the last couple years?

1 **A.** No. It was -- this distinction was created in 1978.
2 So the field has moved forward over the last more than 40
3 years under this kind of umbrella with these two kind of
4 buckets of research.

5 **Q.** And I appreciate your -- I am not really a name dropper,
6 but can you give us the name of the researcher who came up
7 with that distinction and how he's been perceived and done
8 work in the field?

9 **A.** Yes. His name is Gary Wells, and he was my Ph.D.
10 supervisor's supervisor. So I guess you would call him my
11 academic grandfather. That's how we refer to it in the
12 field.

13 And he has received numerous lifetime achievement
14 awards for his contributions to policies, procedures,
15 eyewitness identification procedures, and he is considered
16 the leading figure in -- in the research on eyewitness
17 identification. He's at Iowa State now and continues to
18 publish and -- very regularly.

19 **Q.** And the reason I sort of brought up Mr. Wells is because
20 he came up with this distinction in 1978. Has he, with other
21 researchers, published sort of an important paper summarizing
22 the status of your field over the last couple years?

23 **A.** Yes. In 2020, he was a lead author in something that
24 we call a white paper on the field of eyewitness
25 identification and procedures. So he is the lead author who

1 assembled another, you know, team of lead researchers for
2 around the country to make proposals about what is the best
3 way for law enforcement to collect this kind of evidence and
4 run their identification investigations.

5 Q. Got it. So we talked a little bit about peer review
6 earlier. It sounds like, does the white paper have like, I
7 don't know, peer review on steroids, a more amped-up measure
8 of review; is that right?

9 A. I guess that's one way to call it. It was 18 months of
10 public review. The paper was a subject of like an hour-long
11 conference slot at our annual conference of the American
12 Psychology Law Society. And so they went through some
13 revision processes, and people could provide edits and
14 comments on the draft before it was ultimately published and
15 accepted.

16 Q. Got it. And just to cut to the chase, one of the
17 people -- did you contribute and make comments on the white
18 paper?

19 A. Yes, I did.

20 Q. And one of the witnesses we may hear from in this
21 trial -- I can't speak for the other side -- is a guy named
22 John Wixted. Do you know who he is?

23 A. Yes, I know Professor Wixted.

24 Q. And was Professor Wixted -- thank you for the
25 correction -- did he also contribute to the white paper?

1 **A.** He is an author on the paper, yes.

2 **Q.** And do you disagree with the findings and suggestions and
3 research in the white paper?

4 **A.** No. It's a comprehensive review and set of proposals
5 over the last 40 years culminated into this very long
6 document. I think it's over a hundred pages, which is
7 unusual in our field to have such a long publication.

8 And so, no. I made my comments, and edits were made,
9 and I agreed with the conclusions. It's an excellent paper.

10 **Q.** All right.

11 MR. OWENS: Your Honor, I was going to just jump in
12 to start talking about these estimator variables and the
13 system variables, and the Court wanted to stop a little bit
14 early. I'd hate to ask three questions on a new topic, but if
15 I had ten questions, I'd ask them.

16 THE COURT: Well, it depends on how long it's going
17 to take to answer your questions.

18 MR. OWENS: Sure. Let's just keep going. All
19 right. Thank you, Judge.

20 BY MR. OWENS:

21 **Q.** Last little bit of vocabulary so we can all have our
22 lunch and come back and then sort of digest it together.

23 When describing system variables, which come after the
24 fact, are there -- is there terminology researchers in your
25 field use to describe sort of what's going on, like whether

1 it's fair or accurate or biased? What kind of terminology
2 should we be using from a scientific standpoint?

3 A. Yes. So, commonly, when we're talking about photo
4 arrays or lineups, I should say we use those terms rather
5 interchangeably as well. It's rare for police to do a live
6 lineup. It's usually photos. So a photo array or live
7 lineup we will describe as being biased or unbiased
8 typically. And what that means is that the suspect that we
9 have in that procedure stands out in some way, for whatever
10 reason, a whole host of reasons. And if that happens, we
11 will call it a biased identification procedure. And if they
12 don't stand out and it's a fair kind of test, we call it
13 unbiased.

14 Q. All right. So we have got non-biased and fair on one
15 hand and biased on the other; is that fair to say?

16 A. Yes.

17 Q. And just to be really clear, again going back to the
18 question I asked you about credibility, when you used the term
19 talking about a biased lineup or biased administration, are
20 you implying something about anybody's intent or credibility?

21 A. No. It -- it's just whether the person stands out or
22 not. The intent is not relevant of whether or not the
23 person stands out in the procedure.

24 Q. Okay. So when you say this was a biased identification
25 procedure, you are not making an accusation that the

1 administrator themselves was biased personally, right?

2 **A.** No.

3 MR. OWENS: Is that a good place, Judge? I can keep
4 going.

5 THE COURT: You can keep going.

6 MR. OWENS: All right.

7 BY MR. OWENS:

8 **Q.** So in your report, you've identified a number of these
9 estimator and system variables. And I've got them listed out
10 as 12 basically, just to give us a guide for our conversation.

11 MR. OWENS: Do you mind if I could get the document
12 camera? Thank you.

13 THE COURTROOM DEPUTY: Counsel, has this been
14 published previously?

15 MR. OWENS: I showed this to counsel. It's just a
16 demonstrative, and I believe there is no objection.

17 THE COURT: Well, what -- he believes there is no
18 objection.

19 MR. McLANDRICH: He is correct, Your Honor.

20 MS. FRICK: Correct.

21 THE COURT: It may be published.

22 (Exhibit displayed.)

23 BY MR. OWENS:

24 **Q.** All right. We have got 12 things to discuss, a long
25 list, but we will move quickly.

1 All right. So the first one at the top of the list says
2 opportunity to observe. Now, is that a system variable or is
3 that an estimator variable?

4 A. It's an estimator variable, because it has nothing to
5 do with police. It has all to do with the witness and what
6 they could see at the crime.

7 Q. Got it. And so can you just describe to us sort of what
8 it means, what's involved in evaluating a witness's
9 opportunity to observe and how that might impact an
10 identification?

11 A. Yes. So in the research, when we're studying, you
12 know, how good an opportunity or poor an opportunity a
13 witness has to see something, usually what we manipulate is
14 the length of time. So because we know that the longer you
15 have to see something, the longer you are exposed to
16 something the stronger your memory will be for that -- for
17 that item or for that thing. And which is why I encourage
18 my students to study really hard, right. The longer they
19 spend with the material, the longer -- the better they will
20 remember it.

21 And so when it comes to an eyewitness, if the witness
22 had a very short opportunity to see someone's face versus a
23 longer opportunity, we know that that can impact
24 identification accuracy.

25 Q. Now, is it just the time being around somebody that

1 matters, or when you're studying this as a scientific
2 perspective, what do you mean when you focus on opportunity?

3 **A.** Sure. So to clarify, if an eyewitness is going to be
4 tested ultimately on the face of the individual -- do you
5 recognize anyone here or do you recognize this person --
6 what's really important is how long did you have to see that
7 person's face.

8 As an extreme example, if a person was kidnapped and
9 the perpetrator had a mask on and you couldn't see any of
10 the person's face, it wouldn't matter if you were with that
11 person for an hour or two weeks. If you could never see the
12 face, it's not going to be helpful for you in being able to
13 recognize. So it truly is the amount of time that the
14 witness has to see the face of the individual that the
15 research shows is important.

16 **Q.** So we focus on the face, and then are there things that,
17 as it relates to this opportunity factor, about the
18 circumstances of the commission -- and we will just call it a
19 crime -- that can impact an opportunity to observe the
20 perpetrator's face, even in that moment?

21 **A.** Yes, absolutely. So in my example, I used like a mask,
22 you know, that the person might use. But also the presence
23 of a weapon has been shown to affect the witness's ability
24 to be accurate later on. Because what our research shows is
25 that when a perpetrator uses a weapon during the crime, that

1 witnesses tend to look at the weapon. And we've shown this
2 interestingly using eye tracking software. So we've done
3 studies where we can actually see where a person has focused
4 their eyes at any particular time. And what we learned from
5 that is when a weapon is present, witnesses tend to look at
6 the weapon. And so when they are doing that, they are not
7 spending the time, you know, as much time looking at the
8 witness -- the perpetrator's face in order to have a better
9 or stronger memory.

10 Q. Is another --

11 THE COURT: Two minutes.

12 MR. OWENS: Thank you, Judge.

13 BY MR. OWENS:

14 Q. Is another factor that can reduce sort of this
15 opportunity to observe disguise even less than the extreme
16 type of mask that you described?

17 A. Yes. Researchers have looked at much less extreme
18 disguises. So if a person's wearing a hat, like a baseball
19 hat or a Tuke in the winter, sunglasses, glasses can affect
20 our ability to be accurate at an identification later on.

21 Q. Okay. Is a Tuke, is that like a beanie?

22 A. Yeah, sorry. That was very Canadian. Yes, like a knit
23 winter hat, yes. That's a Tuke.

24 Q. All right. Thank you. And then would sunglasses
25 constitute a disguise?

1 **A.** Yes. I think I said that. Glasses and sunglasses,
2 yes, would.

3 **Q.** Okay.

4 MR. OWENS: There we go.

5 THE COURT: If you're ready.

6 MR. OWENS: Absolutely.

7 THE COURT: Ladies and gentlemen, we're going to
8 recess for the lunch hour. Now, I would like -- we're going
9 to do something a little different. If I can ask -- let me
10 see how I want to do this.

11 I'm going to ask you folks, if you would, please, just
12 retire to the jury room -- it won't take long -- retire to the
13 jury room after we recess, and then remain there until
14 Ms. Penski comes to talk to you, all right?

15 Anything else, counsel?

16 MR. OWENS: Not for now, Your Honor. We appreciate
17 it.

18 MR. McLANDRICH: No, thank you.

19 MS. FRICK: No, Your Honor.

20 THE COURT: Thank you. We will stand in recess. We
21 will reconvene at 1:15.

22 THE COURTROOM DEPUTY: All rise. This court stands
23 in recess.

24 (Jury out at 11:49 a.m.)

25 (Recess at 11:49 a.m.)

1 (In chambers at 11:51 a.m.

2 THE COURT: We're on the record outside the presence
3 of the jury.

4 I just feel compelled, I think this is very, very, very,
5 very, very minor. I don't think I can say "very" too much.
6 But I felt it was necessary for me to bring it to your
7 attention and to also do a very quick voir dire of three of
8 the jurors.

9 I instructed all the jurors to -- that I was giving them
10 tablets to take notes. I instructed all the jurors to leave
11 their tablets on their seat at the end of the day, that those
12 would not be disturbed.

13 It's come to my attention that three of the jurors, the
14 tablets were not on their seat. I'm not quite sure where the
15 tablets were or went. I believe one of the tablets possibly
16 was never taken out of the bag we gave them, but I don't know
17 where the others are. They are all -- I have told and I'll --
18 I have told Ms. Penski to tell everyone that those tablets
19 need to be on those seats if they are not in that jury box.

20 They are now, I believe -- are they -- they are all on
21 the seats, but I feel it is -- I believe that I need to call
22 in and just ask a question of Jurors 2, 3, and 4. Just, I
23 just need to ask them -- their tablets have not been on their
24 seat. I will tell them, they need to be on their seat, but
25 have those tablets always been in their total custody and has

1 anyone had the opportunity to read or write in those, into
2 those tablets.

3 MR. OWENS: I apologize, Your Honor. This is David
4 Owens. I just want to put on the record, I noticed that those
5 three were not there, and that only Juror 1 had theirs at the
6 end of the first day. I just sort of laughed to myself, "We
7 know who the rule followers were." But I didn't think
8 anything about it. I didn't do anything.

9 THE COURT: Well, we've watched them -- the back
10 row's taking notes, and the back row's tablets are on their
11 seats. The front row, tablet 1. 2, 3, and 4 aren't there.

12 We did view a tablet for Juror Number 3 in the bag below
13 her seat. We surmise that she's never even taken it out
14 because none of those ladies, those 2, 3, and 4, are taking
15 notes. But I think I need to ask that question.

16 MR. McLANDRICH: Yes. It seems fair. Does it make
17 any sense to also inspect the tablet as part of your --

18 THE COURT: No, I don't think I want to inspect it.

19 MR. KANOVITZ: We don't --

20 THE COURT: If they say no one else has had it; that
21 they have kept it in their possession; that no one has had any
22 ability to, in any way, shape, or form, modify it, I don't
23 tend to -- I mean, because I have told them that I am not
24 going to infringe upon them. I mean, if you want to put that
25 on the record, you can. I don't want to get into it.

1 MR. McLANDRICH: No. I'm just --

2 THE COURT: And then what that does, that just
3 gives -- I am showing all the parties the notes that the
4 people were taking.

5 MR. McLANDRICH: No, I am not interested in seeing
6 them. I was thinking more about the cause in the sense,
7 because it would seem to me the concern if they are taking the
8 tablet home with them, are they, you know, adding anything to
9 the tablet that's extraneous from the trial. That was the
10 only reason I raised that issue.

11 THE COURT: Well, I will ask them that question.

12 MR. McLANDRICH: I don't want to see the tablet.

13 THE COURT: I don't think I want to do anything
14 else.

15 Anything?

16 MR. OWENS: We agree the Court should not see the
17 tablets.

18 THE COURT: Folks, any --

19 MS. FRICK: No, Your Honor. We are fine with it.

20 THE COURT: Let's start --

21 THE COURTROOM DEPUTY: Let's not start with 2,
22 please. Start with 4. They are laughing because she is in
23 the walker, and she will take up most of our time. So we can
24 get 4 and 3 out of the way.

25 THE COURT: Let's start with 4.

1 THE COURTROOM DEPUTY: Do you want me to excuse the
2 others?

3 THE COURT: No, not yet. That's why it's important
4 we make this brief, because I want to get my juror out of
5 here. I don't think there is anything to this, but it came to
6 my attention.

7 MR. McLANDRICH: I believe they are blank.

8 THE COURT: What's that?

9 MR. McLANDRICH: I believe they are blank.

10 THE COURT: I bet you they are too. Especially with
11 the ones not taking any notes. I am not quite sure that the
12 one lady ever took it out, but that's her choice.

13 MR. McLANDRICH: The day that I saw the lady with
14 the walker had the bag on the front of the walker, she was
15 going out. She'll probably say something.

16 (Juror Number 4 now present.)

17 THE COURTROOM DEPUTY: Juror Number 4.

18 THE COURT: Juror Number 4, come right in. Please
19 don't be intimidated.

20 PROSPECTIVE JUROR: Okay.

21 THE COURT: We're very friendly.

22 THE JUROR: Okay.

23 THE COURT: But it's important that we ask you a
24 question. As you know, the Court instructed initially that
25 the tablets that we gave you be left on your seat. It has

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1 been noticed that yours wasn't always on the seat. Can you
2 tell us where the tablet has been other than on your seat?

3 THE JUROR: On my lap when I was sitting there.

4 THE COURT: Like at night.

5 THE JUROR: Oh, we took them home, several of us
6 did.

7 THE COURT: Okay. Did you have total control over
8 those tablets?

9 THE JUROR: Yeah. There's nothing in mine at all.

10 THE COURT: But no one had the ability to get
11 control of it or write in it or do anything to it?

12 THE JUROR: No. I left it in my car.

13 THE COURT: Oh, okay. So it was in your car?

14 THE JUROR: Yeah.

15 THE COURT: If you could, please just leave it on
16 the seat from now on at night.

17 THE JUROR: Okay.

18 THE COURT: Counsel, do you have any questions?

19 MR. McLANDRICH: No, sir.

20 MS. FRICK: No, sir.

21 THE COURT: That's all I need to know. Thank you.

22 THE JUROR: I'm sorry.

23 THE COURT: No, no, no. Wait. There is no reason
24 to be sorry about anything, all right?

25 THE JUROR: Okay.

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1 THE COURT: We're fine.

2 (Juror Number 4 excused.)

3 THE COURT: You know, this whole process is
4 intimidating for a juror.

5 MR. OWENS: And terrifying.

6 THE COURT: Although she is probably just sighing a
7 big sigh of relief because she didn't know what in the heck we
8 were doing.

9 MR. OWENS: She also snitched immediately.

10 (Juror Number 3 now present.)

11 THE COURTROOM DEPUTY: This is Juror Number 3.

12 THE COURT: Juror Number 3, come right in. Please
13 do not be intimidated. Have a seat. Please don't be
14 intimidated. We have to ask you a question.

15 THE JUROR: Sure.

16 THE COURT: At the beginning of the trial, it was
17 instructed that you were going to be given tablets and the
18 tablets need to be left on your seats. It has been noticed
19 that your tablet has not always been on your seat when you
20 have not been in the jury box.

21 THE JUROR: Yes.

22 THE COURT: Can you tell me where the tablet's been?
23 Has it always been in your control or what?

24 THE JUROR: Yes. I haven't even wrote anything in
25 it. It's been there right now.

1 THE COURT: Did you take it home?

2 THE JUROR: No.

3 THE COURT: So you've left it here?

4 THE JUROR: It's been in my truck.

5 THE COURT: Okay. So you haven't taken it home, but
6 you left the building with it, and you took it to your truck.
7 But no one's had access to it?

8 THE JUROR: Correct.

9 THE COURT: Plus, there's nothing in it, right?

10 THE JUROR: I don't carry a purse, so I put my keys
11 and phone in it.

12 THE COURT: No problem, no problem, no problem. If
13 you would, please, when you leave the jury box, that tablet
14 needs to be on -- what we are trying to do is trying to avoid,
15 unbeknownst to a juror, someone takes a look or whatever.

16 THE JUROR: Sure.

17 THE COURT: That's not right. So we just want to
18 protect the process and you, okay?

19 THE JUROR: And I think James let us know this
20 morning too that we could leave it. I wasn't sure.

21 THE COURT: But just leave it on the seat, and it
22 will be fine. Thank you very much. Wait a minute. Hold on.

23 Do you guys have questions, anybody?

24 MR. McLANDRICH: No, sir.

25 MS. FRICK: No.

1 THE COURT: Thank you very much.

2 (Juror Number 3 excused.)

3 (Juror Number 2 now present.)

4 THE COURT: Hello.

5 THE JUROR: Hello.

6 THE COURT: Whatever's best for you, you can either
7 have a seat there or -- this will take one minute.

8 THE JUROR: I'll stand.

9 THE COURT: At the beginning of the trial, we
10 instructed everyone that we are giving you tablets. Tablets
11 needed to be left on the seats. It has been noticed that
12 several jurors have not left their tablets on the seats. What
13 we need to know is where those tablets have been, has anyone
14 else had access to them.

15 THE JUROR: No.

16 THE COURT: No? Did you take one home?

17 THE JUROR: I took one home last night.

18 THE COURT: But no one else has had access to them?

19 THE JUROR: I haven't been around anybody.

20 THE COURT: Okay. I don't have any other questions.

21 Do you?

22 Can you just leave it on the seat.

23 THE JUROR: It's there when they said it again.

24 THE COURT: No problem, no problem. There is no big
25 problem here. It's just we need to make sure that we conform

1 with our rules because we don't want somebody to get ahold of
2 one of your notebooks, and then we have a real problem.

3 THE JUROR: Yeah.

4 THE COURT: That's all. Thank you. Enjoy your
5 lunch.

6 (Juror Number 2 excused.)

7 THE COURT: Anything else, counsel?

8 MR. OWENS: Thank you for your time.

9 THE COURT: No problem. I'm sorry to bring that up.
10 I thought, well, they are not there and they are supposed to
11 be there, so I don't know where they have been. Okay.

12 (Concluded at 12:04 p.m.)

13 (Jury in at 1:22 p.m.)

14 (In open court at 1:23 p.m.)

15 THE COURT: Welcome back, everyone.

16 We are back on the record.

17 Counsel ready to proceed?

18 MR. OWENS: Yes, Your Honor.

19 MR. McLANDRICH: Yes, sir.

20 THE COURT: You may proceed.

21 BY MR. OWENS:

22 **Q.** Dr. Dysart, before our lunch break, we spent some time
23 talking about generally estimator variables and system
24 variables, and we were sort of just getting into the first
25 one, which is about the opportunity to observe, right?

1 A. Yes.

2 Q. Just to orient us so we are all on the same page. And
3 the last thing we had discussed was how individuals wearing a
4 disguise could impact the opportunity to observe. We on the
5 same page?

6 A. Yes.

7 Q. And glasses, like sunglasses, can be a form of disguise,
8 right?

9 A. That's what the research shows, that it has a negative
10 impact or it can have a negative impact on accuracy.

11 Q. Great. And is the idea then that even wearing, like,
12 glasses might impact somebody's ability to record features
13 about a face, and that's why the amount of time may not be
14 sort of as significantly correlated with accuracy; is that
15 what's going on?

16 A. Yes. Well, the idea with the disguise is that -- I'm
17 not sure what's happening there.

18 Q. If you speak straight into it. They like to be straight
19 and not off to the side.

20 A. There we go.

21 So the idea with the disguise is that it is obscuring
22 portions of the face, and if you are obscuring portions of
23 the face, you can't -- you can't -- I'm sorry -- you can't
24 encode that information. So, yes, you can't remember
25 features that you never saw.

1 Q. Got it. And so "disguise" in this term, sort of like we
2 discuss with bias, it doesn't necessarily mean that somebody's
3 trying to hide. It could just be things like a hat or common
4 things like maybe a scarf -- I don't know -- that would be --
5 impact your ability to get -- record someone's face generally;
6 is that fair to say?

7 A. Generally, yes. And also a change in someone's --
8 like, for example, women, when they have their hair down or
9 in a ponytail, sometimes that has the same impact as a
10 disguise.

11 Q. Sure. So we're talking about the opportunity to observe.
12 And, obviously, the length of time, you know, that's -- our
13 common sense says the more time, and I think as you said,
14 helps us -- we have a greater opportunity to remember details.
15 But are -- some of the evidence that you have revealed in your
16 research, that witnesses can be mistaken even when they have
17 spent significant periods of time with the perpetrator?

18 A. Yes, we found that.

19 Q. And let me just say, when I said "significant periods of
20 time," what kind of things are you seeing in the research and
21 proven misidentifications about length of time?

22 A. Sure. So there are laboratory studies that we can do
23 where we can manipulate time so that we can make a
24 conclusion that time was the thing that made a difference.

25 And so researchers have used periods of 15, 10, 15

1 minutes as an exposure time. Typically, it's much shorter.
2 But in the DNA exoneration cases and archival studies where
3 it's actual cases and real witnesses, we can collect the
4 information to find out how much time the witness and the
5 perpetrator or the victim and perpetrator were together, and
6 those periods are hours in some cases.

7 **Q.** And so am I right -- and also that they are not only
8 hours, but they are often hours of times, like in the DNA
9 exoneration cases, many of those are sexual assault cases,
10 correct?

11 **A.** Correct. Because biological evidence is left behind,
12 yes.

13 **Q.** So are you saying that even if somebody in rape cases
14 with the perpetrator for like a series of hours, they can
15 still make a misidentification?

16 **A.** Yes. The majority of the DNA exoneration cases are
17 sexual assault cases, and researchers have accumulated all
18 of the information about the estimator variables, including
19 time, and we see in those cases that some are two, three,
20 four hours where the victim was with the perpetrator but
21 made a mistake and identified an innocent person.

22 **Q.** Now, this is, I think, a little bit related to the idea
23 of passage of time. Has your research gone into the idea
24 about how much, you know -- how victims or witnesses are able
25 to record like how much time, so if they said, hey, how long

1 were you with the perpetrator, was it 10 minutes, 20 minutes,
2 two hours, has your research focused on recording those types
3 of statements from victims or witnesses?

4 **A.** Yes. We call it time estimation. So we -- in our
5 research, what's really critical is, because we are in
6 control of everything and we know everything that happens to
7 the witnesses in our studies, we know exactly how much time
8 a witness was exposed to someone or saw someone. And we --
9 studies that are interested in this will ask people, How
10 long do you think that this whole thing took? Like how long
11 was the interaction?

12 And what the research shows is generally people tend to
13 overestimate the amount of time that the interaction took
14 place. So when you ask people about a 30-second
15 interaction, in one study on average people thought it was a
16 minute and a half, for example, so three times the length
17 than the actual interaction was.

18 MR. OWENS: Can I get the document camera, please.

19 THE COURTROOM DEPUTY: You haven't asked to publish
20 it.

21 MR. OWENS: This was the same one that was up
22 earlier.

23 (Exhibit displayed.)

24 BY MR. OWENS:

25 **Q.** All right. So we've talked -- just our little roadmap

1 here so we are on the same page, moving right along -- talked
2 about the opportunity to observe and some things that can
3 impact that as an estimator variable.

4 The next one on the list is effects of stress and
5 arousal. So what does that mean as an estimator variable?

6 MR. OWENS: You can take that down. Thank you.

7 THE WITNESS: What that means is researchers have
8 looked at whether more stressful circumstances, more stressful
9 events, whether they are remembered better by eyewitnesses or
10 participants in our study or if they are remembered more
11 poorly. And so that's the kind of general idea from the
12 research. And so in an experiment, we would manipulate
13 something in the study to make -- to make it stressful for
14 some of our participants or make them afraid.

15 The arousal is like running; when we ask people to run,
16 that actually causes the same effects as when people are
17 afraid or stressed in our experiments.

18 BY MR. OWENS:

19 Q. Fair to say that high levels of stress are correlated
20 with negative impacts on the reliable -- excuse me -- the
21 accuracy of an identification?

22 A. Yes. So the more stressful the event, the less
23 accurate the eyewitness identification. That's the general
24 relationship.

25 Q. So I guess I want to make sure that I understand this

1 correctly because, generally, I thought it was, you know,
2 stressful events, things like something happened that was
3 traumatic, things like that would be seared into my mind,
4 because it was a super stressful thing, I'm likely to, you
5 know, encode all the information. Is that wrong?

6 **A.** Unfortunately, you are wrong. What will happen is that
7 a really stressful or traumatic event is memorable in that
8 you probably will never forget that it happened. You know,
9 for example, posttraumatic stress disorder is being
10 researched by memory researchers now because this is the
11 issue. People who have posttraumatic stress disorder can't
12 stop thinking about the event. And so you are very likely
13 to remember that the event happened, but during the actual
14 experience itself, having a high degree of stress and
15 arousal does not make us better at remembering the
16 information, at encoding the information, as we would, say,
17 in the memory research.

18 Like fight or flight, right. It's not important to
19 remember the details; it's survival.

20 **Q.** So I guess, hypothetically, in your research, is being a
21 victim of a rape or a sexual assault considered the type of a
22 stressful situation that is likely to negatively impact the
23 accuracy of an identification?

24 **A.** Yes. We would say that would be a very stressful
25 event.

1 **Q.** And then from a scientific perspective, backed up in the
2 research and the things that you have seen, those are the
3 types of cases where misidentifications can occur; is that
4 right?

5 MR. McLANDRICH: Your Honor, objection. These are
6 all very leading questions.

7 THE COURT: I agree.

8 MR. OWENS: No problem.

9 So I guess I am trying to avoid -- I am trying to mind
10 the Court's rulings, so just give me a second because I don't
11 want to go afoul of that. That's really my point.

12 THE COURT: I appreciate that.

13 MR. OWENS: Let me try to -- I want to stay in my
14 lane.

15 BY MR. OWENS:

16 **Q.** I guess what I'm just really asking straightforward is
17 like, as far as the research goes, is the sexual assault, a
18 rape, the type of thing that's viewed as high stress in terms
19 of the science of identification?

20 **A.** Yes, it would be considered high stress.

21 **Q.** So the next sort of factor on our list -- and I won't
22 pull it up again -- is delay. What do you mean by "delay"?

23 **A.** So delay is the amount of time that passes between when
24 you first see the event, the critical event that you are
25 being tested on, and when your memory is ultimately tested

1 for that. So if you, for example, witness a crime and
2 report it right away and the police come and interview you
3 right away, you know, that would be a short delay for the
4 interview. But if you didn't report a crime for a long
5 time, then the delay would be longer, as an example.

6 **Q.** And so what does the research say about the amount of
7 time that goes by and the accuracy of a potential
8 identification?

9 **A.** Yes. So researchers have studied this because it is a
10 natural phenomenon that we would expect to see in many
11 cases, and so researchers have studied delays of up to 11
12 months, where a participant in a study would be exposed to
13 either a video or a person live, a target person, and then
14 researchers would ask that person to come back many months
15 later, a couple of months -- in this one study up to 11
16 months -- to then see will this individual remember the
17 person that they interacted with. So that would be an
18 example of one study.

19 And what researchers found is that over time false
20 identifications or mistaken identifications of innocent
21 people rose to 93 percent. So 93 percent of people after 11
22 months when presented with some photos made a mistake and
23 picked an innocent person.

24 **Q.** So if 11 months is a significant delay, is, for example,
25 hypothetically, a two-year delay between the event and an

1 identification procedure, would that be significant as well?

2 **A.** Yes. I mean, more time that passes, it still continues
3 to be a factor. There is no theory that says that memory
4 would suddenly just get better over longer and extended
5 periods of time. So, yes, it would be considered a long
6 period of delay in our research.

7 **Q.** I want to make sure I heard that right. You said there
8 was a 93 percent after 11 months, that there were errors; is
9 that right? I just might have misheard you.

10 **A.** No, that was correct. So witnesses who came back after
11 the 11 months and were shown photos, 93 percent made a
12 mistake and picked an innocent person when they were shown
13 photos where the true person that they saw wasn't there.

14 **Q.** Got it.

15 THE COURT: Counsel, let's all listen carefully so
16 that we don't have to repeat every answer that she gives.

17 MR. OWENS: Thank you, Judge.

18 BY MR. OWENS:

19 **Q.** The next on the demonstrative is the issue of
20 contamination. What's "contamination" mean as an estimator
21 variable?

22 **A.** So contamination is anything that happens to the
23 witness or anything the witness sees or experiences after
24 the original event, which is usually a crime. Anything that
25 happens after that can become incorporated into the

1 witness's memory. And we call that contamination because
2 when the witness is ultimately asked to describe or discuss
3 what happened at the original event, we make mistakes
4 sometimes and we believe that things that happened after are
5 actually things from the original experience.

6 And so researchers call this the contamination of
7 memory because it's no longer this pristine kind of without
8 influence thing that the witness is talking about.

9 **Q.** And can there be contamination from other witnesses in
10 the events themselves?

11 **A.** Other witnesses, the media police reports -- I mean,
12 police, like, news reports. There are many ways where
13 contamination can occur.

14 **Q.** And is this the type of thing that just comes from people
15 talking to one another? Is that a form, a potential form of
16 contamination after the event?

17 **A.** Well, the contamination after the event, talking to
18 another person, would have to be with someone who also
19 witnessed the event or has some knowledge or information
20 about the event.

21 **Q.** Can you sort of give an example of how that might happen,
22 hypothetically?

23 **A.** Yes. So in our experiments when we study
24 contamination, we'll often have maybe two participants or
25 multiple participants together watching a video that they

1 are going to be asked to talk about later or in the room
2 when some live kind of crime or event happens.

3 And then we ask those people to talk to each other.
4 You know, you are two witnesses to a crime. Talk and see
5 what happens. And what we can see from that is that
6 witnesses learn information from other people. And when you
7 interview those witnesses separately, they've incorporated
8 the information that they learned from the other person into
9 their own account.

10 **Q.** So we talked a little bit about multiple witnesses
11 talking to one another and potentially contaminating each
12 other. Can the police or other law enforcement, can they also
13 provide a contaminant effect?

14 **A.** Yes. So if law enforcement provide the witness with
15 information, then that information can become incorporated
16 into -- into the memory. It doesn't really matter the
17 source; if it's another witness or law enforcement, the
18 contamination effect is the same.

19 **Q.** So, for example, if a law enforcement officer spoke with
20 the witnesses after the event and said something about the
21 appearance of the perpetrator, could that be a contaminating
22 effect?

23 **A.** Yes, it could.

24 **Q.** And does that type of contamination impact the accuracy
25 of identification from a scientific perspective?

1 **A.** Yes, it certainly can. If the witness learns
2 information from another witness that happens to be wrong or
3 incorrect and they incorporate incorrect information into
4 their memory, it certainly can affect how they are going to
5 perform in a photo array or in a lineup.

6 **Q.** You, in your report -- I guess one thing I am trying to
7 understand is -- I'll move forward and maybe come back to it
8 in a minute.

9 The fifth thing on our sort of list here of estimator and
10 system variables is description accuracy. What's meant by
11 that in your field?

12 **A.** Yes. So in our experiments, we always know what the
13 actual target person or criminal looks like because we've
14 typically hired them or selected them for the experiment.
15 And so we know exactly what they look like -- their age and
16 all of that as well.

17 And so then what we do is in virtually every eyewitness
18 study, we ask participants to describe the person that they
19 saw. And then what we can do is we can look at how close
20 the witness's description was to the actual correct answers
21 that we know. And so this information gives us, you know,
22 kind of an insight into eyewitness accuracy: What types of
23 information would we expect to see from witnesses. Where do
24 witnesses typically get it wrong. These are the types of
25 things we look at in the research.

1 Q. So is there any correlation between the discrepancy
2 between the description of a perpetrator and the accuracy of
3 an identification that's been shown in the studies?

4 A. Yes, there is a relationship. So when witnesses
5 provide wrong information, they get things completely wrong
6 in their description, there is a relationship to mistakes
7 that are made when they are later shown photos and asked to
8 identify the potential kind of culprit. So the more
9 mistakes they make on the description, the less accurate
10 they will be on the identification task.

11 Q. We mentioned this earlier, but the Brandon Garrett study,
12 did that report anything about a mismatch between descriptions
13 in some of the mistaken identification cases?

14 A. Yes. So in the DNA exoneration cases, what's
15 interesting is that those individuals were exonerated
16 because of DNA. And in just over half the cases, that DNA
17 from the crime, from the case has been matched to the actual
18 perpetrator who committed the crime.

19 And so Brandon Garrett knows or was able to find out
20 what the actual perpetrator looked like in those -- in those
21 cases. And so when you compare the person who was innocent,
22 wrongfully convicted, to what we now know the actual
23 perpetrator looked like, there is a big mismatch in many of
24 the cases -- huge difference in height and in weight and
25 age, skin tone, the whole very -- whole variety of factors

1 is what he found from those DNA cases.

2 MR. OWENS: Can I get this back again? Thank you.

3 (Exhibit displayed.)

4 BY MR. OWENS:

5 Q. All right. So last time since we were on this
6 demonstrative here, we have moved through a number, and we are
7 down at Number 6, which is composite/sketch, as I think you
8 had it in your report. And can you just describe what
9 composite/sketch influence means from a scientific
10 perspective?

11 A. Yes. So researchers have looked at the impact of a
12 police procedure that's sometimes used where witnesses are
13 asked to either sit with a sketch artist and then help
14 create a sketch, which is why we call it the sketch, or a
15 system, what's called a composite system.

16 The older systems used to be a series of
17 transparencies. They were long folders. There would be a
18 folder of eyebrows, and there would be a folder of eyes and
19 folder with noses, like a long file folder, the shape of the
20 face, the hair, maybe ears, like mustaches, glasses. You
21 get it. Every element of a human face, there were multiple
22 selections for a witness to go through this little stack and
23 effectively pick out a nose and then lay it over the
24 transparency and see, does that look -- does that look good?
25 Let's try another nose, right. So this is the process for

1 long ago for composite creation.

2 So researchers have studied, because it's related to
3 face memory and face processing, What are the impacts of
4 doing that? Is it possible that that could somehow distort
5 or affect your memory for what the perpetrator looks like?
6 And how accurate are people at doing this? Like, do
7 composites and sketches usually turn out well? Are they
8 good or not? So this is what we researched for a long time
9 on this topic.

10 **Q.** So, hypothetically, if a victim of a rape involved in the
11 creation of a composite, is that something -- is that another
12 form of potential contamination?

13 **A.** Yes. The research shows that that can have an impact
14 on identification accuracy, yes.

15 **Q.** And, hypothetically, if a victim were involved in
16 creating a composite, is that itself like a first form of
17 identification procedure?

18 **A.** Yes, a composite -- creating a composite or creating a
19 sketch with law enforcement would certainly be considered an
20 identification procedure.

21 **Q.** Why is that the case?

22 **A.** Because at that point in the -- when law enforcement
23 used composites, it's when they have no suspect in the case.
24 Composites are not created when there is already a suspect.
25 And so law enforcement typically used the sketch or

1 composite in a hope -- they put it out. You might see it on
2 the paper, on the news in the hopes that someone will see
3 the sketch or composite and go, "Oh, my goodness. I think I
4 know who that is. I think I recognize that person."

5 So it's, in some cases, the first step in the
6 investigation to try to get some leads to who the
7 perpetrator might be.

8 **Q.** And is there a risk that in a case where the victims or a
9 person has to make an identification, has created a composite,
10 that their subsequent identification refers back to the
11 composite more than their actual memory of the event itself?

12 **A.** Yes. This is a concern again with the contamination,
13 right. So going through this whole process of creating a
14 composite or working with a sketch artist is typically a
15 longer process. It doesn't take just a couple of minutes.
16 You know, it could take a couple of hours for the witness to
17 go through this entire process to come up with something
18 that they feel looks like or resembles the perpetrator that
19 they saw.

20 And so because they are doing this process for such a
21 long time and get to look at, you know, the compositor's
22 sketch when it's completely finished, their memory for the
23 perpetrator could actually be closer to the compositor's
24 sketch rather than the perpetrator, him or herself.

25 **Q.** So I guess I should have asked you this earlier, but the

1 factors that we are going through here, do they sort of overlap
2 with one another?

3 A. Yes. It's not a silo of issues in most cases. There
4 might be some exception when it comes to the police
5 procedures, but with respect to all of these estimator
6 variables, factors related to the crime and the eyewitness,
7 you have to consider all of them together to try to figure
8 out how strong is the witness's memory. Because that's the
9 key in looking at eyewitness accuracy.

10 Q. Great. On to Number 7, which indicates one of the things
11 you identified in your report is lineup filler bias.

12 A. Yes.

13 Q. Can you describe what you mean by that?

14 A. Yes. So in our experiments, we often manipulate the
15 quality and difficulty of a lineup or a photo array that a
16 witness is going to see. In a typical photo array, a
17 witness sees six people all presented at the same time. And
18 so we equate it to like a multiple choice question on a test
19 or on a driver's exam. And the witness looks at their
20 options in front of them and makes a selection or says no
21 one -- no one's there.

22 When we're talking about bias, what we are doing is
23 making a decision as researchers to make that test harder or
24 easier. And when it's a really easy test, for example, we
25 only have one person who, like, really matches the

1 description or really looks like the true perpetrator, we
2 call it biased, right, because it's leaning to that
3 particular individual making that person stand out. So
4 that's what we refer to as lineup bias.

5 **Q.** Got it. So the word I have on the demonstrative is the
6 word "filler." I think you mentioned it briefly. What is
7 meant by a filler when it comes to a lineup?

8 **A.** If you think about a multiple-choice question, you
9 know, the professor will have what they believe is the right
10 answer and then you have all the wrong answers. They are
11 like absolutely no possibility of being the perpetrator.
12 And so in a lineup we call those the fillers. So they just
13 fill out the photo array, but they are not suspects in the
14 case. There is only one suspect in the identification
15 procedure.

16 **Q.** So when you talk about lineup filler bias, does it have
17 to do with the relationship between the suspect and the
18 pictures of the fillers?

19 **A.** Yes, at how close or how similar do they look to each
20 other. There are other elements, of course, other reasons
21 why someone could stand out, a suspect could, you know, jump
22 off the page, so to speak, to an eyewitness. It might not
23 be how similar their faces are. There are other aspects as
24 well.

25 **Q.** So what are the types of things that might make a lineup

1 fair versus make a lineup biased when it comes to talking
2 about comparing a suspect to the fillers?

3 A. So some of the things that make it fair are when all of
4 the lineup fillers somewhat resemble the suspect in the
5 case, and clearly all of the fillers in the procedure need
6 to match the witness's description. You know, race, age,
7 gender, you know, build, you know, those kinds of -- facial
8 hair, glasses, those types of things are important that if
9 the suspect has those -- those features, then all of the
10 other options need to have those fillers as well. Those
11 features as well.

12 And so if they do, we would say it's fair. Those were
13 good fillers, a good lineup because the suspect doesn't
14 stand out. But as soon as they start deviating from that,
15 then it can potentially be problematic.

16 Q. Would eye color be another factor to consider?

17 A. If the witness mentioned eye color, then, absolutely
18 eye color is one of those -- one of those features that you
19 would need to match on for the fillers.

20 Q. Would the hair color be another feature that you would
21 examine when you are trying to determine whether a lineup's
22 fair or biased?

23 A. Yes. Again, you don't want the suspect to stand out in
24 any way. But in particular, if a witness described hair
25 color -- which from our studies is very common that people

1 mention hair color -- you want to make sure everyone in the
2 array has the hair color or would be described as having the
3 same hair color.

4 **Q.** Does lineup filler bias include issues related to the
5 pictures themselves, like the sort of backgrounds or
6 circumstances of the pictures?

7 **A.** Yes.

8 **Q.** And how so?

9 **A.** So, again, the principle is nobody should stand out in
10 the identification procedure. And so imagine a scenario
11 where all of the fillers look good. They all match the
12 description that the witness provided. They look kind of
13 similar to the suspect. But five of the pictures were taken
14 outdoors with trees behind and the suspect's photo was taken
15 indoors with a solid background.

16 Obviously, the suspect would stand out because he is
17 the only one who doesn't have trees in the background. That
18 would be like a pretty obvious example of why the background
19 makes a difference.

20 **Q.** We also -- when we talk about lineup bias, do you
21 consider age -- do you want folks to be about roughly the same
22 age?

23 **A.** Yes, absolutely. Age is important. And it's, again,
24 one of those features that's often described by an
25 eyewitness to a crime.

1 **Q.** All right. Let's move on to Number 8. We are two-thirds
2 of the way there.

3 So you mentioned a pre-identification, and I apologize for
4 the poor spelling of that word in the demonstrative. That's
5 on me, not the doctor. What's pre-identification information
6 or bias?

7 **A.** Yes. So typically we refer to this as the pre-lineup
8 instructions or warnings that are given to witnesses in a
9 case. You know, our research participants, most have never
10 been in this experience before. They have never been asked
11 to view someone, provide a description, and then see if they
12 could recognize them later. And so we need to provide them
13 with some information about what's going on, like what are
14 we going to ask you to do here. And so that is the
15 pre-identification kind of information that we are going to
16 give witnesses.

17 And research has shown for a long time that, depending
18 on the instructions that you give the witness, it can have a
19 big impact on whether they choose anyone from the
20 identification procedure. So it's important to consider
21 those according to the research.

22 **Q.** Would example of potential pre-instruction -- excuse
23 me -- pre-identification instruction bias include telling
24 witnesses or victims that you have a suspect?

25 **A.** Yes. Because it would clue witnesses in that their job

1 is to pick someone from the identification procedure. So,
2 yes, that's -- that would be considered bias.

3 **Q.** And again relating to what we discussed earlier as it
4 relates to contamination, would, hypothetically, telling
5 victims that somebody had changed their appearance or
6 something like that, would that be another form of potential
7 contamination or bias in this, when it comes to the
8 identification?

9 **A.** Yes. We would consider that a form of bias because you
10 are providing information to a witness that can influence
11 their decision at the end. So how researchers describe this
12 is what we call their decision criterion. So when you need
13 to make a decision about something, like, yes, this is the
14 person I recognize or, no, this is not the person I
15 recognize, each individual person is going to have some
16 threshold, some level where it has to look close enough to
17 their memory in order to say yes.

18 And when you provide instructions to witness -- to
19 witnesses that ultimately lower their criterion by saying,
20 "Don't worry, it doesn't have to match as closely as you
21 expected, doesn't have to be that close," what we show is
22 that increases identification errors.

23 **Q.** So I guess is there a difference between making a choice
24 and making an identification?

25 **A.** Absolutely. This is a very critical point in the

1 research. You know, what we know as researchers
2 definitively is that the eyewitness did some behavior. They
3 pointed to a picture and said -- or a person and said, yes,
4 I recognize that person. And that's all we know, is that
5 they made that choice. We don't necessarily know why.

6 And when the term "identification" or "recognize" is
7 used, it assumes that the witness is making that choice
8 because of their memory. But it's possible that the witness
9 is making the choice because of influence in the situation.
10 That's what social psychologists would study and find.

11 **Q.** So the next one is, I have here on the demonstrative
12 blind administration of the photo array, which may sound a
13 little bit awkward. Can you just describe what you talk about
14 when you talk about blind versus non-blind administration of a
15 identification procedure?

16 **A.** Yes. So blind administration is sometimes referred to
17 as double-blind administration. And it's more commonly
18 known in the field of like pharmaceutical testing, for
19 example, where a pharmaceutical company wants to get a new
20 drug approved, and so they'll engage in double-blind
21 clinical trials where neither the doctor nor the patient
22 will know which condition the patient is in. Because they
23 want to make sure that the doctor's not influencing the
24 outcome or anything in some way. Not because we don't trust
25 doctors in these conditions, it's that humans tend to see

1 what they want to see.

2 And so the blind administration in lineups and photo
3 arrays is when the person who is actually administering the
4 identification procedure does not know who in that photo
5 array or lineup is the actual suspect. So it's someone
6 who's not involved in the case, isn't aware of the
7 investigation. They are the person who is the one who runs
8 the procedure with the witness.

9 **Q.** So I guess what you'd want to avoid when it comes to this
10 factor is the investigator who knows who the suspect is; is
11 that right?

12 **A.** Correct. That that person should not be the person who
13 is handling the photos or running the lineup procedure.

14 **Q.** And is part of the concern here that the investigator who
15 knows who the suspect is may influence or cue a witness while
16 they are conducting the identification procedure, even subtly,
17 without doing it in very explicit ways?

18 **A.** Yes. Not only subtly, it might not even be conscious.
19 Like the person might not even be aware that they are
20 smiling and nodding, you know, as the witness, you know,
21 starts to talk about maybe the person who is their suspect
22 in the case. You know, they are these kind of unconscious
23 cues that we can give to other people, again, that they
24 might not be aware of. But that is the concern, that the
25 witness is picking up on these things.

1 Q. And it's certainly possible for there to be explicit cues
2 given by an investigator, hypothetically, who was hoping to
3 get an identification, right?

4 A. Of course that's possible.

5 Q. So what's "identification feedback," Number 10 here?

6 A. So identification feedback is when, after the entire
7 identification procedure is finished and the witness has
8 made a selection or said, no, I don't recognize anyone here,
9 this is the information that's given to the witness after
10 that. So is the witness told -- in our research, we've
11 manipulated, like, "Oh, good, you've identified the
12 suspect." In my own research, I've used, "Oh, thank you.
13 You have been very helpful."

14 So that type of information is what we call feedback to
15 the witness about their identification and the accuracy.

16 Q. So I guess just to break this out a little bit more, you
17 are saying after an identification procedure has been given,
18 this is about information, for example, a police officer might
19 provide to a witness about that identification that can impact
20 the accuracy at a later event; is that right?

21 A. Well, there is multiple ways that it can have an
22 impact. Certainly, it can -- if the witness is down the
23 line later asked to make another identification of the same
24 person, certainly that can influence that witness's choice.
25 They are more likely to stick to their original choice.

1 When they are told, "Good job. You got the right answer,"
2 they are more likely to commit to that.

3 But there are other aspects of the feedback that
4 researchers are concerned about, and we've -- that we've
5 seen in actual cases where researchers have conducted
6 studies with witnesses in actual criminal cases. And that
7 is when witnesses are told, like, "Good job," like, "You got
8 'em," witnesses tend to become more confident in their
9 identification. Like, yes, okay, I knew it, right. We see
10 this in our research participants routinely.

11 And then when we ask them like, "Oh, by the way, I
12 forgot to ask you, like, were you paying attention and did
13 you get a good look at the person during the crime?"
14 Witnesses in the studies that are given this feedback are
15 much more likely to believe and to report that they got a
16 great view, they are really certain, their memory's very
17 strong and very clear. So the feedback has those kind of
18 double pervasive effects according to the research.

19 Q. So providing -- if a witness was provided feedback,
20 hypothetically, that might increase the confidence that they
21 express that they had if you asked them later, even if they
22 might not have at the original time; is that right?

23 A. Yes, that's correct.

24 Q. So the next point here is Number 11, relates to witness
25 confidence. And this is going to be something we're going to

1 talk about for a minute because I think, as Mr. Wixted who may
2 testify on behalf of Mr. Moore in this case, is likely to
3 focus on this issue. So I wanted to separate it out.

4 What do you mean by -- or what's meant in the research as
5 it relates to system and estimator variables when it comes to
6 witness confidence?

7 **A.** Yes. So witness confidence is probably what you
8 imagine. When we ask a witness after they made their
9 identification decision -- and typically when I say that,
10 they have selected someone. They have said, "Yes, that's
11 the individual."

12 It's important to find out how sure they are. Like,
13 are they guessing? Like, I kind of think it's this person
14 or are they like, "Absolutely, you know, this is the best
15 decision. A hundred percent this is really the person that
16 I saw."

17 Because what the research shows clearly is that when an
18 eyewitness is asked to view, like, good procedures, fair
19 identification procedures, and all the other conditions
20 we've talked about -- double-blind administration, good
21 fillers, they were given that instruction, you know, you
22 know, careful instructions that the right answer might not
23 even be here at all, and it's their first identification
24 attempt -- when all those procedures are together,
25 confidence is really meaningful. It's really important.

1 Because witnesses who say absolutely certain that's the
2 person, they are very likely to be accurate. So that's why
3 we're really interested.

4 But you can't look at confidence if all those other
5 preconditions aren't met. If they are given feedback, if
6 it's, you know, not double-blind, if the lineup isn't fair,
7 the confidence really can't be interpreted in the same way.

8 **Q.** Okay. Can you say more about that? So when you say when
9 these pristine conditions aren't met, what impact does that
10 have on assessing a victim or witness's stated confidence?

11 **A.** So I didn't say "pristine," but that's kind of the
12 group, right, that we had these like series of kind of
13 identification procedures that we've labeled "pristine" just
14 because listing out all of them every time would be
15 extraordinarily long. So we call this kind of group of what
16 we call best practices, pristine procedures, as being
17 critically important.

18 When they are used and the eyewitness makes a positive
19 identification of someone with great certainty, there is a
20 very strong likelihood that that witness is accurate. But
21 if they, with all the same conditions, pristine conditions
22 in place, if the witness is not certain at all, very low
23 confidence, then it's much less likely that the witness is
24 accurate in their decision.

25 **Q.** I guess what I am wondering is, in the absence of

1 pristine conditions, what does confidence tell you about the
2 accuracy of a potential identification?

3 **A.** Well, we really can't use confidence in the same way.
4 It's not something that you can rely on to try to figure out
5 if the witness was right or wrong in their identification
6 when, you know, when the identification procedures were not
7 pristine, right -- the instructions, double-blind, fair
8 procedures.

9 **Q.** So fair to say like if there had been delay or
10 contamination or a mismatch between the description of the
11 accuracy of the perpetrator and the suspect influence through
12 a composite, an unfair lineup, things like that, that a
13 witness's stated confidence wouldn't necessarily correlate to
14 accuracy as a matter of science?

15 **A.** Well, in the science we focus a lot on those pristine
16 procedures. And so -- but -- we need to consider all of
17 those factors together. So they are not in silos, right,
18 these influences. But, again, the more factors that are
19 present that are suggestive or might be a contamination of
20 the witness's memory, the less useful witness confidence is
21 going to be, to the point of not -- not being useful at all.

22 I will give a very specific example. There is no
23 disagreement amongst experts in my field that a witness's
24 level of confidence at trial is meaningless. Like, it is
25 not useful at all for people to consider with respect to

1 accuracy. Because virtually every single witness who
2 testifies at trial is certain, right, that they point in
3 court live, yes, that's the person almost universally.

4 And so at that point, when there's been all of this
5 feedback, all of this information that the witness has
6 received from the time of the identification procedure to
7 trial, at trial it really can't be used at all.

8 **Q.** And so this gets to, I think, the last point here in
9 terms of our estimator and system variables, which is multiple
10 identification procedures and commitment effects. And were
11 you sort of just describing that in a way?

12 **A.** Yes. It's often the case in actual cases that before
13 trial, when, if it's a stranger case, the eyewitness is
14 often asked to, like, look around the courtroom and "Do you
15 see the person that committed the crime?" And they are
16 asked to make that identification. It is very rare that
17 that is the first identification attempt. There is almost
18 always something that happened before -- photo array, a live
19 lineup, or other identification procedures.

20 And so as the identification procedures kind of mount
21 upon each other, more and more procedures, this is what we
22 refer to as the multiple identification procedures. The
23 concern is that the witness's memory now has become
24 contaminated by virtue of seeing the defendant's photo in
25 previous identification procedures. So they are likely to

1 have a pretty strong memory for that individual. They have
2 seen their photograph presented by law enforcement multiple
3 times before. So it should not be a shock to anyone that
4 the witness can pick out the person in court that they've
5 selected from multiple identification procedures or even a
6 single identification procedure before.

7 Q. So just to be sure, if there's -- hypothetically, if
8 there was initial identification procedure like creating a
9 composite, a separate array, then a separate in-person
10 hearing, you are saying that a witness's stated confidence at
11 trial is not a reliable -- strike that -- is not an accurate
12 indicator of -- does not correlate to accuracy; is that right?

13 A. Yes. It cannot -- it cannot at that point be used to
14 try to determine accuracy, that's right.

15 Q. And is that true with any subsequent identification
16 procedure after the first one, whatever it is?

17 A. Yes, um-hmm.

18 Q. So fair to say the first identification procedure is sort
19 of make or break in terms of assessing the reliability --
20 excuse me. Sorry.

21 THE COURT: Because you are --

22 MR. OWENS: I apologize, Your Honor. It was just a
23 poor word choice.

24 BY MR. OWENS:

25 Q. So let me back up.

1 So you are saying the first identification procedure,
2 sort of the make or break when it comes to assessing
3 scientifically the accuracy of an identification from a
4 scientific perspective?

5 **A.** Absolutely. In fact, in the label of pristine
6 identification procedures, it has to be the first
7 identification procedure. That's -- that's the definition.
8 That's part of the definition of pristine procedures.

9 **Q.** So we've talked about this concept, and you just
10 mentioned it now, pristine identification conditions. Does
11 that sort of shorthand come from any particular paper or
12 research that we've discussed already today?

13 **A.** Yes. The label of pristine was really solidified in
14 the field in 2017 by an article that was written really
15 about eyewitness confidence, almost in its entirety, by
16 Professor Wixted and Professor Wells, Gary Wells -- we
17 talked about earlier.

18 **Q.** And so Professor Wixted himself is one of the people who
19 forwarded this idea that confidence and accuracy are
20 correlated when you have these pristine conditions; is that
21 right?

22 **A.** Yes, very strongly correlated. That confidence is
23 extremely useful when the pristine conditions are used, yes.

24 **Q.** And so your understanding of the research, if there
25 aren't those pristine conditions, is there a disagreement

1 between you and Dr. Wixted, that you perceive, as relates to
2 the relationship that confidence plays with accuracy?

3 A. I don't think there is a disagreement. I think it's an
4 excellent paper, and I agree with the conclusions, that you
5 cannot rely upon or use witness confidence if you don't have
6 pristine procedures.

7 I did a search. The word "pristine" appears over 65
8 times in that one article. So it's -- clearly pristine
9 conditions are a necessary element for being able to use
10 witness confidence to make any determination about accuracy.

11 Q. And so are the 12 factors that we have sort of just
12 discovered -- discussed -- excuse me -- estimated variables
13 and system variables, are those the types of -- are those the
14 factors that are the basis for your general opinion we
15 discussed earlier that if you assume that the suspect is
16 innocent, that there is a very low probability that three
17 separate eyewitnesses would select him as the perpetrator
18 unless there is some suggestion by a sort of administrator
19 influence?

20 A. Yes.

21 MR. McLANDRICH: Objection.

22 THE COURT: I'm going to allow it. It's already
23 been answered.

24 THE WITNESS: Yes.

25 MR. OWENS: Those are all my questions. Thank you.

1 THE COURT: Thank you.

2 Counsel, do you want to break, or do you want to go?

3 MR. McLANDRICH: Just a moment, Your Honor. I'd be
4 happy to go.

5 THE COURT: All right.

6 **CROSS-EXAMINATION**

7 BY MR. McLANDRICH:

8 Q. Good afternoon, Dr. Dysart.

9 A. Good afternoon.

10 Q. So just to back up and cover a little bit of the ground
11 again. Estimator variables, I believe you have testified, are
12 things that are beyond the control of law enforcement?

13 A. Correct.

14 Q. All right. So, obviously, that means there is nothing
15 that law enforcement would do that would make the
16 identification more or less reliable because these things are
17 outside of their control?

18 A. Right. They cannot influence the estimator variables,
19 that's correct.

20 Q. And are you aware of various studies that Dr. Wixted and
21 others have done with respect to some of these estimator
22 variables, starting off, let's just say, with the issue of
23 delay?

24 A. Yes.

25 Q. And aren't there, in fact, studies that show that while

1 delay reduces the likelihood that someone will make a correct,
2 high-confidence identification, that if, in fact, they still
3 make that high-confidence identification under the proper
4 conditions, that that's still an accurate identification?

5 A. Yes. It's not likely to happen, but it can happen,
6 yes.

7 Q. Right. So when we talk about the effective delay and the
8 eroding memory, it's reducing the number of high-confidence
9 identifications we'll get, but those high-confidence
10 identifications that we do get are still highly accurate?

11 A. If pristine conditions are used, that's correct.

12 Q. And when you talk about pristine conditions, those, you
13 are really talking about laboratory conditions, correct?

14 A. No. The pristine conditions are that it has to be the
15 first identification of the suspect; the pre-lineup warnings
16 must be used; it has to be a fair, unbiased identification
17 procedure; a double-blind administration; and the witness
18 confidence has to be recorded immediately after. It's those
19 five elements make up the term "pristine."

20 Q. And those elements of a pristine identification, the
21 science of eyewitness identification, like all science, has
22 evolved over time, correct?

23 A. Science evolves over time, and we do too, yes.

24 Q. And so these identifications that were done in 1988 would
25 have been done under the standards of 1988 as opposed to the

1 current science of today?

2 **A.** Are you talking generally about police investigations
3 in 1988? Is that what --

4 **Q.** I am talking generally about the science that may have
5 trickled its way down to the police. In other words, the
6 police couldn't be held accountable for science that didn't
7 exist when they did their identification in 1988?

8 THE COURT: Hold on.

9 MR. OWENS: Objection, Your Honor. This was
10 excluded about the Court's ruling on the motion --

11 THE COURT: Well, he is talking about science.
12 That's what he is saying.

13 MR. OWENS: I thought he said something about
14 trickled down to what would be an enforceable --

15 MR. McLANDRICH: I'll reask the question.

16 THE COURT: Thank you.

17 MR. McLANDRICH: Thank you.

18 BY MR. McLANDRICH:

19 **Q.** Putting the police aside, no one can be held accountable
20 in 1988 for science that hadn't yet developed, correct?

21 **A.** Well, it's not my role to decide who's accountable. If
22 the information didn't exist, then people couldn't have
23 known the information if it didn't exist.

24 **Q.** It's just a truism?

25 **A.** I would say so, yes.

1 Q. All right. And are you also aware of studies with
2 respect to whether double-blind administration is impactful
3 depending on whether it's a sequential presentation of photos
4 as opposed to all the photos being presented in what's
5 colloquially referred to as a six-pack?

6 A. Yes.

7 Q. Doesn't -- don't those studies show that the impact of
8 double-blind administration is much more impactful in a
9 sequential lineup where the photos are put down one at a time
10 like a deck of cards as opposed to presented all at once in a
11 six-pack?

12 A. There is actually an interaction between lineup
13 instructions and the manner in which the photos are shown
14 all at one time or one -- all at the same time or one at a
15 time. So there is an interaction that happens, depending on
16 the instructions.

17 Q. I was asking about blind versus double-blind. We will
18 get to instructions in a moment.

19 A. Sorry, yes. As a scientist, as a researcher, it's not
20 appropriate to talk about what we call main effects when we
21 know there are significant interactions. And so I just
22 wanted to say that I -- certainly the question, but the
23 answer is it depends, and it depends on what the
24 instructions were with respect to simultaneous and
25 sequential.

1 Q. And the instructions are oftentimes, like, say, even in
2 the research, a preprinted form that is read to somebody?

3 A. Yes. Or we will verbally give the instructions to a
4 witness, yes, those two options.

5 Q. Now, when you talked about the importance of the first
6 identification by the witness of the potential suspect, and I
7 think you said that you agree with Dr. Wixted and essentially
8 the body of social scientists agree that that's the critical
9 identification, is that first initial identification, correct?

10 A. Yes, I agree.

11 Q. All right. And so when the officer presents the photo
12 array, if this is the first array this witness has been shown,
13 that is, in fact, that first identification that you are
14 referring to?

15 A. Yes.

16 Q. And if that witness makes a high-confidence
17 identification in that photo array, then, you know, putting
18 aside everything else for a moment, that's the critical
19 identification so that if they make a high-confidence
20 identification in that array, assuming the other conditions
21 are proper, then there is a high degree of accuracy to that
22 identification, correct?

23 A. Yes. By -- if you mean proper, you mean pristine, yes.
24 If pristine procedures are used, then a high-confident
25 witness tends very likely to be accurate.

1 Q. And as you say, when that first identification is made,
2 we want to record the level of confidence that that witness
3 expresses when they make that identification?

4 A. Yes. That's actually one of the elements of pristine,
5 because it has the five elements of it. And it has to be
6 immediately after, before the witness is given any of the
7 feedback, like "good job" or something of that.

8 Q. Sure. Understood. And so if that witness makes that
9 identification as you've just described, it's got a high
10 degree of accuracy?

11 A. Under pristine conditions, yes.

12 Q. And notwithstanding that there might have been some delay
13 between -- even a significant period of delay -- between the
14 event that's at issue and that identification that that
15 witness is making?

16 A. That's -- I think there is one research study that has
17 looked at that, and that's what the conclusions were. So I
18 tentatively support that. As a scientist, I would like to
19 have, you know, more information than just one experiment on
20 it, but the research from that one paper is supportive of
21 that.

22 Q. Yes. And you talked earlier about the DNA cases and the
23 number of misidentifications that were made in the DNA cases.
24 Do you recall that?

25 A. Yes, I do.

1 **Q.** All right. And isn't it true that the individuals that
2 made those misidentifications, in fact, when the
3 identifications were evaluated, they were actually low-
4 confidence identifications?

5 **A.** Actually, we don't know is the answer to that. So in
6 Brandon Garrett's book, where he looked at the first 250,
7 all he looked at were trial transcripts. He didn't have
8 available to him original police reports and all of those
9 other types of information that might be useful. And what
10 he found is when he looked at the trial transcripts and the
11 witnesses or victims were testifying, they mentioned -- 57
12 percent of them mentioned that they were initially
13 uncertain.

14 But we have no information about the other 43 percent
15 of witnesses. So we have no idea if they were absolutely
16 certain at the beginning or not because, you know, from that
17 source, we just don't have the information.

18 **Q.** All right. But for those that expressed that they were
19 initially uncertain, that would be a low-confidence
20 identification that the science has now shown would not be
21 deemed reliable, would have a low degree of accuracy, correct?

22 **A.** For the 57 percent that we have information on. And,
23 again, this is their recollection at trial. What we really
24 want to look at would be the police reports, any
25 contemporaneous notes that police make.

1 And, again, this has to be from pristine procedures.
2 That's the other key. It's not -- it's not useful to be
3 talking about confidence and how to interpret confidence and
4 what it means if we don't have the pristine procedures. So
5 that's a critical element to consider.

6 **Q.** Yes, okay. And that would certainly be true with a high-
7 confidence ID. But someone who's got a low-confidence ID and
8 the conditions aren't pristine, that would be even more
9 indicative that it was a bad identification, correct?

10 **A.** Well, we don't know from a scientific perspective. We
11 don't -- we don't have research on that.

12 **Q.** All right. And so you talked a little bit earlier, as
13 well, about the identification at trial. And I think
14 Dr. Wixted and you and basically the social scientists are in
15 agreement on this, where it's sort of referred to as the
16 in-court identification now is the theater piece, if you will,
17 where now they are simply reiterating the identification they
18 have previously made, correct?

19 **A.** Correct.

20 **Q.** And that's why the focus is on this initial
21 identification, and so that has been sort of testified to as
22 the one that matters. And so if we have the high-confidence,
23 quality identification under the right conditions, then that's
24 highly accurate and the trial is simply a reiteration of that?

25 **A.** Yes. What do you mean by "quality identification"?

1 There is some elements -- I don't want to answer incorrectly
2 if I am not sure I understand your question.

3 **Q.** Yes. So I understand that you predicate your -- your
4 answer, your prior answer on pristine conditions,
5 quote-unquote.

6 **A.** I do. Dr. Wixted does, Dr. Wells, others in the field,
7 yes. We all use pristine conditions to -- that has to be
8 the precursor to be talking about the usefulness of
9 confidence.

10 **Q.** And so the high-confidence identification under pristine
11 conditions is highly accurate. In the trial, we are simply
12 replaying or reiterating that previous high-confidence
13 identification?

14 **A.** Quite likely, yes, um-hmm.

15 **Q.** And aren't there, in fact, studies that Dr. Wixted and
16 others have done to show that a number of these variables
17 don't impact the accuracy of a high-confidence identification?
18 And I will get to specifics.

19 So isn't it true that the studies show that the presence
20 of a weapon doesn't render a high-confidence identification
21 inaccurate? It's sort of like delay; it may reduce the number
22 of high-confidence identifications we get, but it doesn't
23 change the accuracy of those identifications -- high-
24 confidence identifications that we get?

25 **A.** I think there is one study that has looked at that,

1 and, again, that's the conclusion from the one study. As
2 researchers, we like to see replication and extension. So
3 that is the conclusion from that article, yes.

4 Q. And when we talk about opportunity to observe, there's a
5 number of factors that sort of -- or attributes that fall
6 under that umbrella of opportunity to observe.

7 A. I agree, yes.

8 Q. All right. And one of them is the length of time I get
9 to observe the person?

10 A. Yes.

11 Q. One of them would be the quality of that observation? In
12 other words, if I'm a hundred yards away, obviously, my
13 opportunity is much less than if I am sitting next to them in
14 a car?

15 A. Distance is a critical factor to consider in eyewitness
16 accuracy.

17 Q. And also, I would imagine, perspective. In other words,
18 if I'm seeing them walking away from me as opposed to if I am
19 seeing them face to face or seeing them, you know, profile and
20 face to face, I'm getting a better imprint into my mind; is
21 that fair?

22 A. You are getting a better opportunity to observe, yes.

23 Q. All right. Now, you talked a little bit earlier about --
24 and I'm not entirely sure of the context of this, but you said
25 something about 93 percent of the people being mistaken when

1 there is a delay.

2 **A.** Yes. That was a particular study that was done, I
3 think, in the 1970s that looked -- it's the one experiment
4 that we have that has looked at the longest amount of delay,
5 up to 11 months.

6 And in our experiments, what's really critical is that
7 we have conditions where we have a photo array where the
8 true perpetrator or culprit is in there. He's present.

9 And then we also want to test, though, are witnesses
10 able to recognize that the answer might be none of the
11 above. So if it's an innocent suspect in that person's
12 place, does a witness make a mistake and pick that innocent
13 person who might happen to look similar.

14 So in that particular experiment, after 11 months, when
15 participants were shown the photo array that did not have
16 the perpetrator, 93 percent, like, mistakenly chose from
17 that identification procedure someone who was not the
18 perpetrator, and he was not there.

19 **Q.** All right. But notwithstanding that, what we also know
20 today, though, is if we have a high-confidence identification
21 notwithstanding that delay, under pristine conditions, while
22 we are going to have fewer of those identifications, the
23 identifications we do get are still going to be highly
24 accurate?

25 **A.** Yes. As I said earlier, I think there is one study

1 that's found that, and that would be a fairly recent study.
2 So researchers are continuing to explore, you know, how long
3 does that hold up for, how many weeks or months does that
4 relationship still continue to exist.

5 Q. And once upon a time it was sort of the generally
6 accepted view of social science, if I'm not mistaken, that as
7 a body, eyewitness identifications were, quote-unquote,
8 inherently unreliable?

9 A. I don't think that's the general view of the field.
10 Based upon our own research, that's not true from the data.
11 So I don't believe that was the general held -- generally
12 held view in my field.

13 Q. Okay. And if it was ever the generally held view, it's
14 certainly not anymore?

15 A. Well, we much better understand the conditions under
16 which witnesses are inherently unreliable. And so we're
17 much more nuanced about when that actually happens.

18 Q. And so with respect to things that the officers or any
19 officer would have no control over, that obviously includes
20 the opportunity to observe?

21 A. Yes.

22 Q. That would include whether there was any stressful
23 arousal element to the event?

24 A. Yes.

25 Q. That would include the factor of delay?

1 **A.** Yes.

2 **Q.** That would include contamination that happens with
3 respect to interaction with other witnesses, people in the
4 public, other -- other people who might have some information
5 about the event outside of law enforcement?

6 **A.** Perhaps. If law enforcement put information to the
7 media, they would be the source of the information; and so,
8 therefore, they could be the source of the contamination.

9 **Q.** Understood. And, also, they have no control over the
10 description accuracy in terms of what the witness is able to
11 convey?

12 **A.** To some degree, because if a witness provides a vague
13 description, law enforcement -- for example, they forget to
14 mention like the race or ethnicity. You know, we can't
15 leave that as a question mark. We have to follow up, right,
16 and ask that specific question.

17 So it's a little bit of a give and take. A witness
18 provides what they can remember, and then law enforcement
19 asks some follow-up questions to get more details.

20 **Q.** Sure. But notwithstanding that, the ability or quality
21 of the witness to give a description as to height or age or
22 weight or the tone of a hair color are all in the control of
23 the witness's memory and perception and their ability to
24 convey that to -- to law enforcement or to anyone else?

25 **A.** Yes. Again, for the most part. There are different

1 ways that that kind of information can be obtained by
2 witnesses. So it comes to the way in which witnesses are
3 interviewed. So it's widely known that witnesses might make
4 a mistake on the height of an inch or two or weight because
5 it's hard sometimes to, you know, to discern. So you can
6 say, well, was the person like my height? Or taller than
7 this person? Are they about my size? Is the hair color
8 like mine? In trial transcripts, I often see skin tone,
9 like, was it like my skin tone or someone else's.

10 So there are ways law enforcement can use tools to get
11 more accurate information from witnesses. It's not the
12 witness's fault if bad questions or inappropriate questions
13 were asked of them trying to get that information.

14 **Q.** Understood. But notwithstanding the appropriate question
15 being asked, the person may or may not have an accurate memory
16 or be able to accurately correlate it to my height, your
17 height, my skin tone, your skin tone, the questions that you
18 just suggested?

19 **A.** That's correct. A witness -- a witness might have a
20 poor memory or a weak memory or inaccurate memory if they
21 perceived something incorrectly, and then they are going to
22 report that with the right questioning, yeah.

23 **Q.** And with respect to the composite sketch effect. Now,
24 these are things that are routinely done by police departments
25 throughout the world?

1 **A.** Yes. They are not that common as a form of evidence
2 collection, but, yes, they are used around the world.

3 **Q.** And probably less common in today's world than in the
4 historical world; is that fair?

5 MR. OWENS: Objection; vague.

6 MR. McLANDRICH: I will withdraw it.

7 THE COURT: Okay.

8 MR. McLANDRICH: It's not important.

9 THE COURT: It's withdrawn.

10 BY MR. McLANDRICH:

11 **Q.** Now, with respect to lineup filler bias. The science,
12 correct me if I'm wrong, shows that the critical aspect of the
13 filler is that their facial image, their persona, resemble the
14 suspect who's the subject of the lineup, correct?

15 **A.** Well, it's certainly one element to take into
16 consideration. Because I discussed earlier how backgrounds
17 and other features might impact, or one person's smiling and
18 no one else is. Like, there are other ways that the lineup
19 can be biased or suggestive.

20 But clearly, what the individuals actually look like,
21 their appearance, that is certainly one thing to take into
22 consideration.

23 **Q.** Are you aware of studies that have been done that show
24 that things such as the color of the background, if the facial
25 features are sufficiently similar, don't impede the accuracy

1 of the identification? Are you aware of those studies?

2 **A.** On false identification of innocent people, I -- I'm
3 not certain, actually. My opinion comes from multiple
4 sources, including the new white paper that -- which is the
5 position, best practices/policy recommendations procedure
6 that we talked about earlier. That has a very specific
7 section on how backgrounds and other portions of the -- of
8 the images or the photographs are very important to take
9 into consideration.

10 So -- so the lead scientists who made that
11 recommendation were basing that on their understanding of
12 the research literature.

13 **Q.** So if Dr. Wixted was to testify that the -- it's the
14 facial features and not the background color which is
15 important to assuring the accuracy of the identification, you
16 would disagree with him?

17 **A.** I think he disagrees with himself if he were to testify
18 to that because he is one of the authors of that best
19 practices document that says backgrounds are important and
20 should be considered. So I would be, I think -- he would be
21 disagreeing with his own writings if he did testify to that.

22 THE COURT: Doctor, I think the question is do you
23 disagree with it.

24 MR. McLANDRICH: Yes, sir.

25 THE WITNESS: If he were to testify that that was

1 the case, yes, I would disagree, based on reading his
2 writings.

3 BY MR. McLANDRICH:

4 **Q.** And the same would be true if the head of one suspect is
5 tilted or more in the foreground than the face of another
6 suspect in the photo array pictures; is that correct?

7 MR. OWENS: Objection; vague.

8 THE COURT: Overruled.

9 THE WITNESS: So the principle is any way that
10 someone stands out from the others. So there is a litany of
11 ways that you can imagine that someone's photograph might
12 stand out. And if the suspect's head was tilted in a
13 different way than all of the fillers, all of the other
14 options, then that would make the person stand out, and that
15 would be considered biased.

16 BY MR. McLANDRICH:

17 **Q.** And, again, if Dr. Wixted was to testify that it's the
18 facial features that are the elements that drives accuracy and
19 not the size of the head or the tilt of the head, you would
20 disagree with him?

21 **A.** If he testifies to that, I would disagree with that,
22 yes.

23 **Q.** Yes. And are you aware of studies that would indicate
24 that even though a witness may give an inaccurate description
25 of a suspect, that they can still make an accurate high-

1 confidence identification of a photo, or a suspect in a photo
2 lineup?

3 A. I'm not aware of a study that looks at description
4 accuracy and high confidence. I'm not aware of a published
5 study on that.

6 Q. Are you aware of the Meissner, Sporer, and Susa 2008
7 study that indicated that there was no significant
8 relationship between description accuracy and identification
9 accuracy?

10 A. Their conclusions that there is no relationship? No,
11 that's not my understanding of that. I think it's a book
12 chapter.

13 Q. No significant relationship.

14 A. Yeah, that's not my -- that's not my understanding of
15 that book chapter.

16 Q. Not your understanding, all right.

17 And the social science that you are testifying about
18 essentially regards the eyewitness identification as a memory
19 test; isn't that fair?

20 A. Well, actually, there's been a lot of discussion in the
21 field in the last probably two years that is changing the
22 way that we talk about this evidence. So it's not only
23 eyewitness memory, but it's also eyewitness behavior. So
24 the choosing.

25 And so a social psychologist like myself, we -- for a

1 while, we were the researchers who were kind of leading the
2 field. And then more cognitive psychologists became
3 involved. And now social psychologists are like, wait a
4 minute. What happened to social influence? We've kind of
5 ignored -- the research field has ignored that for a while.

6 And it's been a big discussion because there are
7 wrongful conviction cases where we now know that the witness
8 who testified at trial, who identified or selected the
9 defendant from a procedure never saw the crime at all. And
10 so clearly that witness cannot be making an identification
11 decision based on memory. It had to be something else.

12 So the conversation in the field is really evolving
13 to -- to discuss, yes, eyewitness memory is clearly a
14 component, but eyewitness behavior -- their choosing, the
15 reactions, et cetera -- are also things that are very
16 important to consider.

17 **Q.** And maybe I was not listening carefully enough, but did
18 you say that there's witnesses that are identifying suspects
19 that didn't see the crime?

20 **A.** Correct. Wrongful conviction cases where we learn
21 after the fact in the part of the re-investigation -- we
22 being, you know, individuals, conviction review units,
23 conviction integrity units held in prosecutors' offices --
24 when they reinvestigate a crime, the witness recants and
25 said, "You know what? I was a young kid. I was a young

1 punk. They, you know, told me I should make this
2 identification; I did it. And so I made the selection. I
3 testified in trial and, you know, I'm sorry," or whatever
4 they say in their recantation. So we know that those exist.

5 So for the field to pretend that this is only a memory
6 issue is incorrect, because we know that there are people
7 who testify at trial who are testifying to things that they
8 themselves did not witness.

9 Q. All right. So that's something sort of completely
10 unrelated to what we've been talking about heretofore about an
11 eyewitness's ability to make an accurate identification.
12 Because that person's not even an eyewitness. They may be
13 pretending to be an eyewitness, but they are not even an
14 eyewitness.

15 MR. OWENS: Objection, Your Honor. It's
16 argumentative.

17 BY MR. McLANDRICH:

18 Q. Right? I mean if they are --

19 THE COURT: No, no, I don't think it is
20 argumentative, but get to your question.

21 MR. McLANDRICH: Well, that is my question.

22 BY MR. McLANDRICH:

23 Q. That person that you are describing in this behavioral
24 aspect of it, they are not even an eyewitness because now you
25 say they are testifying with respect to a suspect for an event

1 they didn't even see?

2 A. Well, we've learned, usually decades later, that they
3 are not an eyewitness. The police report reflects that they
4 are an eyewitness. The trial testimony reflects that they
5 were an eyewitness.

6 And so all I'm saying is some -- the vast majority of
7 eyewitnesses I believe and many in our field believe are
8 just mistaken people. They've made a mistake when mistaken
9 identifications happen. It's not motivated. It's not
10 vengeful. It's they've just made a mistake. And we
11 understand a lot about why that happens.

12 But there are other aspects about the witness testimony
13 that are related to things beyond memory. Double-blind
14 administration has nothing to do with memory.

15 Q. Right, right.

16 A. Right?

17 Q. And somebody can just be flat out and out lying --
18 right? -- pretending they saw someone that they never really
19 saw just because they want to say they saw them?

20 A. Certainly there are going to be those cases. And,
21 again, that's not the majority, vast majority of cases --

22 Q. Right.

23 A. -- that we are talking about.

24 Q. That's kind of like your example, where someone's, again,
25 identifying someone in a crime they never saw, whether it's

1 because they have some animosity to them, whether it's because
2 someone's paying them to do it, for whatever their motivation
3 may be. But that's separate from what we've been talking when
4 we talk about eyewitness identification and a high-confidence
5 identification, because those people have no memory. They are
6 just pretending to have one.

7 **A.** In that particular case, yes. But your question was
8 about, is the field about memory, and the answer's no. The
9 field's about more than that. It's not just about memory.

10 **Q.** I understand. I just wanted to segregate those two parts
11 of the field so that I understand and everyone else hopefully
12 understands what we're talking about.

13 MR. OWENS: Objection, Your Honor.

14 If you could let the witness finish her answer.

15 THE COURT: Do you need to say anything else?

16 THE WITNESS: I would like to if that's okay.

17 So the other aspect about memory is that it's on a
18 continuum. And so there clearly are individuals in cases that
19 we know who in the police report have said "I barely saw the
20 person. I don't think I am going to be able to make an
21 identification. I only saw the side of the person's face as
22 they were running away. I saw the back of the face" -- or
23 "back of the head --" excuse me. And yet those individuals
24 are shown identification procedures, select the suspect from
25 the identification procedures, and testify at trial.

1 And so the difference between a witness who wasn't there
2 and a witness who saw the back of the head from a memory
3 perspective is irrelevant. So it's the quality of the
4 witness's memory, their opportunity to observe that's really
5 critical than helping to explain their behavior, which is
6 whether they selected the suspect.

7 BY MR. McLANDRICH:

8 **Q.** Understood. Understood. And that, as you just
9 described, goes back to what we talked about at the beginning,
10 the opportunity to observe the person. If we saw the back of
11 the head, running away from 40 yards away, our ability to make
12 an accurate identification, much different than if we are
13 sitting in the car next to the person for some period of time
14 looking them dead in the face?

15 **A.** In that hypothetical, yes. And, obviously, the
16 opportunity to observe is better in the latter example.

17 **Q.** Yes. Thank you.

18 Now, when we talk about identification feedback, so now
19 we have a circumstance where the identification procedure has
20 occurred and a person has been identified to the officer in
21 the identification procedure, and that's complete. And now
22 the officer says, "Okay, understand, the case is going to go
23 to trial, and Mr. Jones is going to be up on the stand, and
24 you are going to have to identify him." Is that the kind of
25 post-identification feedback that you're talking about?

1 **A.** That would be one example, yes.

2 **Q.** All right. Now, there is really no way to avoid having
3 the witness who's identified the potential perpetrator know
4 that they are going to see Mr. Jones in the courtroom and be
5 asked to identify him, unless you just don't ask to identify
6 him and don't have the witness come, correct?

7 **A.** Can you repeat the beginning part of your question? I
8 am not sure I -- I am not sure I understood the question.

9 **Q.** Sure. Maybe it wasn't a very good question. So I
10 apologize.

11 But, you know, in the world in which we live, once I've
12 identified somebody, if I'm going to continue to prosecute
13 them, there is going to be a day where that person is going to
14 be in the courtroom and everyone, including that witness, is
15 going to know who that person is, and they are going to be
16 asked to say: Is this the person that assaulted you, robbed
17 you, whatever the case might be, correct?

18 **A.** That's the typical procedure in most states but no
19 longer in some states. They just don't -- they avoid the
20 theater, as you mentioned.

21 **Q.** So they just skip that step, and in the courtroom, they
22 talk about what happened in the eyewitness identification
23 procedure and simply rely on that and skip the final step?

24 **A.** Correct.

25 **Q.** All right. But that's more the exception to the rule as

1 we sit here today?

2 **A.** That's my understanding, yes.

3 **Q.** All right. And so when someone is making their
4 high-confidence identification, I presume the people use
5 different words to express their -- their confidence. And it
6 could be "I'm a hundred percent certain," or it could be
7 "that's him," or "I know it's him," or similar words that
8 express to them and to the officer that they are expressing
9 certainty that the person they are identifying is that
10 perpetrator, correct?

11 **A.** Yes. I can't presume to know what a witness means when
12 they say certain things, but I agree that humans use
13 different terminologies or words to express their feelings.

14 **THE COURT:** Counsel, I'm not trying to limit you,
15 but do you know how -- I was going to --

16 **MR. McLANDRICH:** I'm just a moment or two from
17 completion, Your Honor.

18 **THE COURT:** All right.

19 **MR. McLANDRICH:** Thank you.

20 **BY MR. McLANDRICH:**

21 **Q.** And the last factor that you had talked about in the 12
22 points was the multiple ID procedures commitment effect, and
23 that's what we really just talked about now in terms of the
24 in-court identification versus the presentation of the photo
25 lineup?

1 **A.** Yes. You know, after the first identification
2 procedure that contains the suspect, anything else after
3 that would be considered the repeated identification
4 procedure and is not recommended, yes.

5 **Q.** And so you were asked that sort of final question that if
6 the person's innocent it would be very unlikely that three
7 different people would pick that person out of a photo array
8 absent some sort of biasing in the process. And I probably
9 didn't say it quite as well.

10 **A.** I think it's close enough and, yes, I still agree.

11 **Q.** All right. And so the corollary to that would be if the
12 person's guilty and three people picked them out, then there
13 doesn't have to be any bias, right? Three people have picked
14 out the guilty person, and that's what happened?

15 **A.** That's right, there doesn't have to be bias for a
16 witness to select the correct answer, that's true.

17 **Q.** And if three people select that same person without bias
18 being present, then there's a high likelihood that that's, in
19 fact, the perpetrator?

20 **A.** In that general kind of sense, ignoring estimator
21 variables, yes, I would agree.

22 MR. McLANDRICH: Thank you, Doctor.

23 THE WITNESS: You're welcome.

24 THE COURT: Let me see counsel just a second.

25 (At sidebar off the record.)

1 THE COURT: Ladies and gentlemen, we're going to
2 take a ten-minute recess, and then we are going to come back
3 in. I believe there are several more questions on redirect by
4 counsel for plaintiff. There might be another witness; I
5 don't know whether that's all. But we're going to finish up
6 this witness, and then there could be another witness, but I
7 will tell you, at 4 o'clock, we're done.

8 Relax back there. I'll see you in ten minutes.

9 THE COURTROOM DEPUTY: All rise. This court stands
10 in recess.

11 (Jury out at is 2:54 p.m.)

12 (Recess at 2:55 p.m.)

13 (Jury in at 3:08 p.m.)

14 (In open court at 3:09 p.m.)

15 THE COURT: We are back on the record.

16 Counsel ready to proceed?

17 MR. OWENS: Yes, Your Honor.

18 MR. McLANDRICH: Yes, Your Honor.

19 THE COURT: You may inquire.

20 MR. OWENS: Thank you.

21 THE COURT: With regard to matters covered on cross.

22 MR. OWENS: I will be as brief as I can, Your Honor.

23 THE COURT: I am not telling you to be brief.

24 That's all you can ask about.

25 MR. OWENS: I'll be brief anyways.

REDIRECT EXAMINATION

BY MR. OWENS:

Q. So I wanted to start off where counsel began and sort of ended when he was asking you some question about police estimator variables, like opportunity to observe, right? Do you recall that?

A. Yes.

Q. Now, even if police officers can't control what happens during an event, from a system side, the officers can't control what they do afterwards in response to that information, right?

A. Correct.

Q. So, for example, in the cases, some of the examples you gave where maybe somebody didn't get a good look at the face or it had been a couple years later, the police officers still have a decision about what to do in those situations, right?

MR. McLANDRICH: Objection.

THE COURT: You can answer it. Can they make a decision what to do?

THE WITNESS: Yes, that's what the system variables are. They are the choices law enforcement make when they are collecting evidence from the eyewitness, right, about their memory, um-hmm.

BY MR. OWENS:

Q. So you were asked -- I am going to try to go in the order

1 that counsel did so we are all sort of being parallel.

2 You were asked a couple questions about a high-confidence
3 hypothetical, a hypothetical about a first array and being
4 high confident and pristine conditions, and that being a good
5 indicator of accuracy.

6 In a situation in which there was a photo array and then
7 some subsequent court proceedings but the photo array was
8 preceded by a composite, in your opinion, what's the first
9 identification procedure that's relevant for assessing
10 accuracy?

11 **A.** Well, for assessing overall accuracy, it would be the
12 composite because that is where a witness gives an extremely
13 detailed description of the -- of the person that they saw.

14 In a composite, again, you are going through these,
15 like, long, you know, file drawers of noses and various
16 aspects of that person's face. And it's, you know, not to
17 simplify it too much, but it's like Mr. Potato Head. You
18 are like literally building a face. You are constructing it
19 from nothing.

20 That is an identification procedure, and if that's what
21 happens first, that's the first one.

22 **Q.** And counsel next asked you a few questions about Brandon
23 Garrett's study in the DNA cases, and I think prestaging so
24 there is no -- everyone knows, in Professor Wixted's report he
25 says that many of the DNA exonerations, that there was --

1 sorry, Your Honor.

2 He says that a number of the DNA exonerations, that the
3 witnesses had low confidence. Do you recall that in
4 Mr. Wixted's report?

5 **A.** Yes, I do.

6 **Q.** And he was describing Mr. Garrett's study, right?

7 **A.** Yes, he referenced that study for his sources.

8 **Q.** And do you disagree with Dr. Wixted's interpretation of
9 Mr. Garrett's study?

10 **A.** Yes. Well, it's not -- yes, I disagree with it because
11 that's not what the study says. He's very clear -- Brandon
12 Garrett is very clear that they had -- 57 percent of the
13 cases that he looked at, the witnesses testified at trial
14 that they had initially not been certain when they made
15 their identification. That's it. That's all it says.

16 It makes no conclusions or inferences at all about the
17 other 43 percent of victims and witnesses who testified at
18 trial who didn't mention anything about their initial
19 confidence.

20 **Q.** Now, after you saw Professor Wixted -- or, excuse me --
21 Dr. Wixted's report that you disagreed with his interpretation
22 of Mr. Garrett's study, did you reach out to Mr. Garrett?

23 **A.** Yes, I did.

24 **Q.** And what did he say about what Dr. Wixted had to say
25 about his own study?

1 **A.** He said that it is not possible to conclude from his
2 own work that none of the witnesses in the DNA exoneration
3 cases made their identification with -- with high
4 confidence. So he doesn't know. He's like, from the
5 information I have, and data, you cannot make that
6 conclusion based on what I've written.

7 **Q.** It's your change that Doctor -- excuse me -- that
8 Mr. Garrett also disagrees with Dr. Wixted's interpretation of
9 his own study?

10 **A.** Yes, that's -- that's what he said.

11 **Q.** You were asked a couple questions about -- I think that
12 relate to the -- your field and sort of some of the social
13 science you have described as evolving and new. Do you recall
14 those questions?

15 **A.** Yes.

16 **Q.** Has the field of social science and identification and
17 many of the variables that we have discussed today, did those
18 exist long before 1988?

19 **A.** Yes.

20 **Q.** And do those include the sort of factors that we've
21 discussed today?

22 MR. McLANDRICH: Objection.

23 MR. OWENS: I can rephrase. I will withdraw it.

24 BY MR. OWENS:

25 **Q.** Can you please tell us the origin or sort of the

1 historical view of the research in your field that you are
2 opining about today as it precedes 1988?

3 MR. McLANDRICH: Objection.

4 THE COURT: And the basis?

5 MR. McLANDRICH: It's completely nondescript. I am
6 not even sure what it's asking.

7 MR. OWENS: Your Honor, I am trying to do two
8 things. One, I am trying to avoid leading the witness; and,
9 two, I am responding to counsel's specific line of questions
10 about what was things like in 1988. And so that's where this
11 is directed at.

12 I can rephrase.

13 THE COURT: All right. Try to rephrase and then
14 we'll see.

15 MR. OWENS: Sure.

16 BY MR. OWENS:

17 **Q.** Your field, eyewitness identification, the social science
18 that relates to it, the factors that we discussed today, can
19 you describe how that appeared in the literature before 1988?

20 **A.** Yes. There's actually just one excellent source for a
21 lot of the information, and that's in 1987, a professor
22 named Elizabeth Loftus, who is widely considered the world's
23 leading expert in memory research, she published a book
24 called *Eyewitness Testimony: Civil and Criminal*, with an
25 attorney, and that was published in 1987. It's over 400

1 pages of these exact kind of issues, right, related to
2 estimator variables and system variables.

3 That book is now in its sixth iteration, and I've been
4 a co-author for the last three iterations, so from 2007
5 until -- until today. So its sixth edition. So there was a
6 good deal of research on this, enough to accumulate into
7 this large book, and she was pulling from research going
8 back into clearly the 1960s that were being done in
9 eyewitness identification, and a lot of her own work as well
10 in the 1970s.

11 Q. You were asked a few questions also about lineup filler
12 bias, and do you recall that?

13 A. Yes.

14 Q. All right. So I want to just make sure that I understand
15 what your opinion is about, whether or not a fair lineup.
16 What is it being used to match the description to? So what
17 should we be looking to? What's our comparator? Does that
18 make sense?

19 A. I think so. So when we're picking the fillers, that's
20 what you are referring to?

21 Q. Yes.

22 A. Yes. So when you are picking the lineup fillers, so,
23 again, if you think about like a multiple choice question,
24 so when you write a multiple-choice question, the person
25 writing it has their answer, the thing they believe to be

1 the correct answer. In a police lineup, that's the suspect.
2 And now we have to come up with the other options.

3 And in an eyewitness identification scenario, law
4 enforcement -- the research shows law enforcement should use
5 the witness's description, and every single element that the
6 witness mentions in their description should be used to
7 select the other options, the fillers in the -- in the
8 identification procedure.

9 Typically, witness descriptions are not extremely
10 lengthy. Maybe seven to nine items. So there is not a lot
11 of -- there is not a lot that has to be done in terms of
12 matching, you know, finding people who look similar.

13 And then what needs to -- what you have to make sure is
14 that the suspect still doesn't stand out for whatever
15 reason. So if the witness didn't mention anything about
16 facial hair and the suspect has, you know, a beard, then you
17 have to make sure that all of the other fillers also have a
18 beard even though the witness didn't mention it at all
19 because that person, the suspect, would stand out being so
20 different than all the others.

21 So it's the combination of look at the description;
22 everyone in the identification procedure has to match, at a
23 minimum, all of the features that the witness mentioned.
24 And then when you step back from it, ask, Does anyone stand
25 out here? And if it's the suspect, you got to go back and

1 make sure that, you know, you, you know, pick some different
2 fillers and make some different choices so that the person
3 doesn't stand out.

4 Q. And so one of those things would, of course, be the hair
5 color of the suspect matching the other people in the lineup.
6 Fair to say?

7 A. Yes, that's correct.

8 Q. Do you recall being asked on cross-examination about
9 different vocabulary words individuals might be -- use to
10 express levels of confidence?

11 A. Yes.

12 Q. All right. So when assessing confidence at the time an
13 identification is made, is there something -- do you assess
14 only the words that a person says or also their behavior?

15 A. Well, depending on the research study, when we're --
16 sometimes we videotape participants, and we can go back and
17 look at their behavior as well. But there's -- you know,
18 there's one clear element that's really important, and
19 that's the decision time. Like, how long did the witness --
20 that's another behavior. How long did it take for the
21 witness from the time the photos were shown until they made
22 their identification decision? The amount of time that
23 passes is extremely telling with respect to identification
24 accuracy. And that early research showed that if a witness
25 makes a quick decision, within 10, 15 seconds makes an

1 identification, it's very likely to be accurate. Because
2 recognition is a quick process. When we see someone we
3 recognize, you know, it doesn't take like a long period of
4 time. Otherwise, social interactions would be very awkward.

5 So when the researchers looked at periods of 45 seconds
6 to a minute and looked at, okay, finally, when a witness
7 made a selection after 45 seconds to a minute, how often
8 were they right and how often were they wrong. And they
9 found that -- the complete opposite. So about 90 percent of
10 the time witnesses were wrong when the witness took 45
11 seconds to a minute to make their decision.

12 So -- so that's the other behavior, I guess you would
13 say, we look at in identification accuracy.

14 Q. And so hypothetically if it took a witness, you know,
15 more than a minute to make an identification, would that be an
16 indicator that it's less likely to be accurate?

17 A. From the research, yes, that's what it would suggest.

18 Q. Same thing for two minutes?

19 A. Yes. The longer -- the longer it is, the, you know,
20 the more problematic, I would imagine, it would be.

21 Q. And is there a special term to use this factor that you
22 have just described in the research?

23 A. Yes. We call it response latency. So how long does it
24 take them to respond, essentially.

25 Q. All right.

1 MR. OWENS: Those are all the questions I have, Your
2 Honor.

3 THE COURT: Thank you.

4 Recross?

5 MR. McLANDRICH: Thank you, Your Honor.

6 THE COURT: Counsel, we've narrowed it down to
7 anything that was covered by -- on redirect.

8 MR. McLANDRICH: Yes, sir, Your Honor.

9 **RE CROSS-EXAMINATION**

10 BY MR. McLANDRICH:

11 Q. Doctor, so you were asked about the composite --
12 composite. I'm sorry.

13 A. Yes.

14 Q. And you indicated that the composite's an extremely
15 detailed description of the suspect, or words to that effect,
16 right?

17 A. Correct.

18 Q. And the ability to create something of a composite that
19 would qualify as this, quote-unquote, extremely detailed
20 description is a function of those various, in that era, mylar
21 overlays to make up, as you call them, Mr. Potato Head?

22 A. Correct. Called Identi-Kit, was the name of the tool.

23 Q. And might there not be circumstances where their
24 composite that is created with those mylar overlays isn't
25 really an accurate depiction of the suspect?

1 **A.** Just to clarify, you said accurate or inaccurate? I
2 couldn't hear.

3 **Q.** Accurate, might not be an accurate depiction of the
4 suspect?

5 **A.** Yes, yes, that's correct.

6 **Q.** And one indicator of that could be if the witness said,
7 you know, I really am not satisfied, really not happy with the
8 image this composite -- composite is creating, correct?

9 **A.** Yes, that would be an indicator that it was probably a
10 difficult task. As we know, creating these composites is
11 extraordinarily difficult for witnesses to do.

12 **Q.** And so in a circumstance like that, even though the
13 creation of the composite is the first effort to create some
14 sort of image of this suspect, certainly no prohibition on
15 doing a later photo array once we have identified a suspect,
16 correct?

17 **A.** Correct.

18 MR. OWENS: Objection.

19 THE WITNESS: Sorry.

20 THE COURT: Rephrase, because I don't understand
21 your word -- I don't know whether we're treading over into
22 something that I have ordered not to -- prohibited.

23 MR. McLANDRICH: Oh, I see. Thank you.

24 BY MR. McLANDRICH:

25 **Q.** So even if we've had an opportunity to create a

1 composite, we are still going to do a photo array when we have
2 an actual suspect, correct?

3 MR. OWENS: Objection to the form of the question.
4 Or objection. It sounds like police procedures. I don't
5 know.

6 THE COURT: Clarify.

7 BY MR. McLANDRICH:

8 Q. So even though we have made an effort to create an image
9 through a composite, we're still potentially -- once we have a
10 suspect, we are not going to rely on the composite. We're
11 going to do a photo array to try and ascertain whether the
12 memory of the witness matches the image of the suspect who
13 we've now identified, correct?

14 MR. OWENS: Objection; vague. I don't know who the
15 "we" is.

16 THE COURT: Counsel, I think if you include -- if
17 you are asking her about social science --

18 MR. McLANDRICH: Let me rephrase. Thank you, Your
19 Honor. I get the point.

20 BY MR. McLANDRICH:

21 Q. In social science, we try and create a composite as some
22 indicator of what the person might look like based on the
23 description. Yes?

24 A. Researchers have studied how well people can create a
25 composite, how much it looks like the person it was intended

1 to represent, yes. We -- we study that, and we use that as
2 a technique in our experiments.

3 Q. All right. And that ability to recreate that, that image
4 that's in the witness's mind, is going to be limited by the
5 options of mylar overlays and the ability of the witness to
6 amalgamate those into an image, correct?

7 A. Yes, that's certainly -- and the quality of the
8 witness's memory, as well. So if you're being asked to
9 create a composite or sketch of a stranger versus a famous
10 person, which a lot of the studies have done, will make a
11 difference as well.

12 Q. And are you aware of any studies that would indicate that
13 a high-confidence identification made under the, quote-
14 unquote, pristine conditions is going to be inaccurate simply
15 because a witness participated in the creation of a composite?

16 A. I think the creation of the composite violates the
17 conditions of pristine condition because it's not the first
18 identification procedure. And so to that point I think
19 it -- that it's not a possibility.

20 But I don't know of any studies that have done the
21 composite and then also looked only at high-confidence
22 identifications from a subsequent photo array. I don't
23 think that research has been done.

24 But it violates the -- the definition of pristine.

25 Q. All right. So while it might not meet the definition of

1 pristine, to suggest that a creation of a composite would make
2 a high-confidence identification inaccurate, at this point, at
3 least in terms of scientific studies, would be speculative?

4 A. I would agree with that, yes.

5 Q. Now, when you were asked about the DNA exonerations and
6 the 57 percent who had expressed that at trial, that they were
7 initially uncertain, and the 43 percent who didn't express a
8 confident statement, we will call that, so for the 57 that
9 expressed low confidence, that would be an indicator that they
10 did not make a high-confidence identification, correct?

11 A. Initially, yes, that's correct.

12 Q. All right. And since they didn't make a high-confidence
13 identification, that would be more indicative of a
14 misidentification than would have been a high-confidence
15 identification?

16 MR. OWENS: Objection; scope and asked and answered.

17 THE COURT: Well, but you questioned her about this
18 whole -- about the 57/43.

19 Overruled.

20 THE WITNESS: Sorry. Can you repeat -- I've lost
21 track of the question. I'm sorry.

22 BY MR. McLANDRICH:

23 Q. I can try. Sometimes I can only do it once, but I am
24 going to try.

25 So we were talking about the 57 percent of people that

1 had expressed low confidence. I think we agreed that that
2 would be more indicative of someone -- strike that. Let me
3 start over.

4 We talked about the 57 percent that expressed low
5 confidence, that would be more indicative of someone who's not
6 making a high-confidence identification and therefore more
7 likely to be inaccurate?

8 A. Yes. They say that they initially were uncertain at
9 the time of the identification. Yes, that's what it means.

10 Q. With respect to the 43 percent, the only point is, we
11 just don't know; we don't have any data to judge the nature of
12 the initial identification they made, whether they expressed
13 high confidence or low confidence?

14 A. Correct. We don't have any of the -- as I stated
15 earlier, what we really would need to do is go back to the
16 original police reports. But, unfortunately, due to the
17 timeline of when these cases took place, the decades that
18 individuals were wrongfully incarcerated, pristine
19 procedures were not the norm, and so even to go back and
20 look at the confidence at the time of the initial
21 identification would likely violate the pristine condition
22 requirement.

23 Q. And then with respect to the, I think you called it,
24 response latency --

25 A. Yes.

1 Q. -- it sounds to me, and correct me if I'm wrong, that we
2 are on the continuum. So the quicker that the witness says,
3 yes, that's the person, then the more confident we feel in
4 that identification?

5 A. Well, the research actually has divided it into -- into
6 like the finite numbers. In fact, it used to be called the
7 10-to-12-second rule initially. And then researchers
8 explored that it might be 15 seconds instead of 12. And so
9 there's a paper called *The Unruly 10-to-12-Second Rule*.

10 So it's -- the general concept is, you know, with
11 around 15 seconds that it takes a witness to look at six
12 faces and decide is the perpetrator here, that's kind of the
13 key.

14 And then they look at 45 seconds and longer and made
15 the decision that it's about 90 percent of the time those
16 selections are wrong when it takes a long time for a witness
17 to make that decision.

18 Q. Yeah. And in the research, we're going to have, I
19 presume, some sort of person there with a stopwatch or a video
20 that we then go back and stopwatch to say, here's when my 10
21 seconds or 15 seconds, or whatever it might be, starts?

22 A. We try to be as methodical as possible. If we are
23 studying that factor, then we are going to measure that
24 factor, because we know it's important.

25 Q. And in the real world, at least in the real world,

1 stopwatches generally aren't present, at least historically?

2 MR. OWENS: Objection. Objection.

3 THE COURT: If she knows.

4 THE WITNESS: What his -- I don't know the
5 development of stopwatches.

6 THE COURT: In the real world, are they using a
7 stopwatch?

8 THE WITNESS: Probably not a stopwatch, but a watch.
9 You know, I'm sure they can look at their watch or a clock in
10 the room and see how long the witness is taking to make their
11 identification decision.

12 MR. McLANDRICH: Thank you. That's all, Your Honor.

13 THE COURT: All right. One question.

14 MR. OWENS: Literally one.

15 THE COURT: All right.

16 **FURTHER REDIRECT EXAMINATION**

17 BY MR. OWENS:

18 **Q.** With respect to response latency, fair to say it's more
19 like falling a cliff -- off a cliff than a continuum?

20 MR. McLANDRICH: Objection, Your Honor.

21 THE COURT: Wait a minute. I don't understand the
22 question yet.

23 MR. OWENS: I'll rephrase.

24 THE COURT: Thank you.

25 BY MR. OWENS:

1 Q. You were just asked some questions about response latency
2 and the period of time by which it takes to make a decision.

3 A. Yes.

4 Q. And I think that you rejected the idea that it was sort
5 of on a continuum, sort of more like falling off a cliff; like
6 once you get to a certain point, the accuracy drops
7 dramatically. Is that right?

8 A. I never thought of that analogy, but that makes sense
9 to me given the fact that the research says at 45 seconds
10 and longer, you know, or a minute or longer, then it's very
11 unlikely that a selection's going to be accurate.

12 MR. OWENS: That's all, Your Honor.

13 THE COURT: Any reason this witness cannot be
14 excused?

15 MR. OWENS: No.

16 THE COURT: Counsel, anything?

17 MR. McLANDRICH: No. Thank you, Your Honor.

18 THE COURT: Doctor, thank you very much. Have a
19 safe trip back.

20 THE WITNESS: Thank you very much.

21 THE COURT: Do you want to call someone?

22 MR. OWENS: Yes, Your Honor. The next witness is
23 Lisa Glasser. Pittman, sorry.

24 **LISA GLASSER SCHRECK, PLAINTIFF'S WITNESS, SWORN**

25 THE COURT: It's Ms. Glasser, is that right?

1 THE WITNESS: It's actually Schreck now.

2 THE COURT: Schreck, okay. Ms. Schreck, please try
3 to keep your voice up so we can -- it sounds like you are
4 going to be able to do that, but keep your voice up so we can
5 all hear your responses to the questions. The microphone's
6 there for you. If you get too close, it will muffle you; if
7 you get too far away, it won't pick you up. But if you keep
8 your voice up, that solves the problem, all right?

9 THE WITNESS: Yes, sir.

10 THE COURT: You may inquire.

11 MR. OWENS: All right.

12 **DIRECT EXAMINATION**

13 BY MR. OWENS:

14 Q. Good afternoon.

15 A. Hi.

16 Q. Can you just state and spell your last name so we have it
17 for the record?

18 A. Yes. It's Schreck, S-C-H-R-E-C-K.

19 Q. First name Lisa?

20 A. Lisa, L-I-S-A.

21 Q. And did you have a -- what was your maiden name?

22 A. Glasser.

23 Q. Do you have a middle name in --

24 A. Lynn.

25 Q. Okay. And did you also have a different last name before

1 it was Schreck for a while?

2 A. Yes. It was Pittman before.

3 Q. And at the time you testified -- you testified in
4 Mr. Gillispie's previous proceedings, right?

5 A. Yes. I'm divorced now.

6 Q. And it was Pittman at that time?

7 A. Yes.

8 Q. All right. Thank you.

9 And I'll just cut to the chase. Do you know Dean
10 Gillispie here?

11 A. Yes.

12 Q. And how do you know Mr. Gillispie?

13 A. I have known Dean since high school. We were very good
14 friends in school and outside of school.

15 Q. And what high school did you go to?

16 A. We went to Fairborn High School.

17 Q. What year did you graduate?

18 A. I graduated in '85, and he was at Park Hills. And then
19 the schools went together, and then Baker and Park Hills
20 went together, and then we -- my sophomore year.

21 Q. Got it. It sounds like there were two schools in
22 Fairborn that got combined into a --

23 A. Correct.

24 Q. -- bigger high school?

25 A. Um-hmm.

1 Q. All right. And did you -- how did you know Mr. Gillispie
2 outside of school?

3 A. Well, we hung out a lot. We went out. Not as
4 boyfriend and girlfriend. We were friends. Good -- very,
5 very good friends, and we went out. We went shopping. We
6 went to the mall. We went to parties. We went to different
7 establishments, like bars, a couple bars that we went to,
8 one, Bourbon Street that I talk about that we used to go to
9 back in the day.

10 Q. Sure. And after you've graduated high school together,
11 did you go off to college or stay in town?

12 A. After -- I went to Ohio State. I was there for three
13 years and came home and finished at Wright State.

14 Q. Got it. When did you -- when you were at Ohio State, did
15 you come home for the summer?

16 A. Every summer. I worked in -- yes, I came home every
17 summer.

18 Q. And when you'd come home from college for the summers
19 before you transferred to Wright State, would you hang out
20 with Mr. Gillispie?

21 A. Um-hmm, yes.

22 Q. Were you aware of his appearance back in high school and
23 then in the late '80s?

24 A. Yes.

25 Q. Could you describe what his hair was like?

1 A. He always had dark hair with gray in it. In school he
2 had gray hair all in his hair. Tall, big man. That's
3 pretty much it.

4 Q. No problem. And did Mr. Gillispie smoke?

5 A. No. He never smoked.

6 Q. Did he have opinions on smoking?

7 A. He hated smoking. He hated that I smoked. I quit
8 seven years ago, thank you.

9 Q. Thank you.

10 A. But he hated it, and I smoked all the time.

11 Q. And I just want to stop you for one second. It's really
12 important that you let me try to finish my question for our
13 court reporter.

14 A. Sorry.

15 Q. I know. It's been a while. So let me just try for our
16 court reporter that we each talk one at a time, okay?

17 A. Yes, sir.

18 Q. Thank you.

19 After you -- sorry. Strike that.

20 Did you keep up with Dean over the years?

21 A. We kept up at first. Then we stopped.

22 Q. Okay. And why did you stop?

23 A. Well, it wasn't -- well, it was because I got married.

24 And my husband had never met Dean, 'cause Dean was in jail.

25 And he wasn't very comfortable with me visiting Dean in jail

1 or being friends with somebody that was in jail at that
2 time. Even though Dean was wonderful, and we knew it, but
3 he didn't know him. So life kind of took that turn, and I
4 didn't talk to him much anymore.

5 Occasionally, he'd call. He used to write me. But
6 later part of it, we didn't talk as much till he's gotten
7 out.

8 **Q.** Okay. And have you been able to sort of reacquaint with
9 Dean over the last ten years since he's been released?

10 **A.** A couple times. I lived in Indiana. So I moved back
11 from Indiana a few years back. So I wasn't here for all of
12 that but -- to hang out with him or see him. But I've been
13 to his -- he's had a couple get-togethers that I've been to.

14 **Q.** Now, how would you describe Dean's personality back in
15 the late '80s and early 1990s when you knew him?

16 **A.** He was the best guy in the whole wide world. It's
17 going to make me cry that he was gone so long. He would do
18 anything for anybody. He was very kind. He was very good
19 to me. We did a lot of things together, friends. He was
20 there. My father adored him. He always felt safe when I
21 was with Dean, and Dean always took care of me when we were
22 out.

23 **Q.** And can you think of a time -- so you just mentioned your
24 father, right?

25 **A.** Um-hmm.

1 Q. And I want to just sort of take you back to 1988. Were
2 you in college at that time?

3 A. I was going to be going to Wright State at that time.
4 Yes, I was enrolled for Wright State. I had come home from
5 Ohio State.

6 Q. Now, when you say you had come home from Ohio State, we
7 are talking about the summer of 1988?

8 A. Yes. That was for good. And I started going to Wright
9 State then at that time.

10 Q. Got it. And did you -- where did you live when you came
11 back?

12 A. At my mom and dad's house.

13 Q. And now, were your parents the kind of parents that --
14 did you have friends over regularly?

15 A. I would have some friends over. My friends, my
16 girlfriends would come over, and Dean came over. Not a ton
17 of people, but my friends would come by like normally.

18 Q. Did you ever have a party at your house in 1988?

19 A. I did.

20 Q. Does that -- was that a regular thing that you would do?

21 A. No.

22 Q. And why not?

23 A. Because my dad would kill me. I mean, not that -- he
24 was a wonderful man, but I was disciplined, and I wanted to
25 make sure I followed all the rules. And when I didn't, I

1 would get in trouble.

2 Q. Got it.

3 A. Pretty simple.

4 Q. And so did you have -- sorry. Strike that.

5 What do you remember about the party that you had in
6 1988?

7 A. Well, I don't really remember much about the party
8 other than what I do remember is that my father and mom's
9 ceiling fan got broken. And I remember I thought I was just
10 going to be in so much trouble. He was going to find out I
11 had a party. And the ceiling fan blade broke. Brian put
12 his arm into it. And so I had this blade that I had to show
13 my parents when they got home, and they wanted to know how
14 and blah, blah, blah. But that's probably why it -- that's
15 why it sticks in my head, because of that moment, you know.

16 Q. Right. And when you mentioned Brian, who is that?

17 A. Brian Poulter. He was also a friend of ours that we
18 hung out with, all of us, that went to school with us.

19 Q. And was Mr. Gillispie at that same party?

20 A. Yes. On Saturday?

21 Q. Yes.

22 A. Yes.

23 Q. And do you know if you saw Dean at all earlier in the
24 weekend on Friday before you had that party?

25 A. I did.

1 Q. And what do you remember about that?

2 A. Well, I don't remember all of it. It's been 30 years.
3 It's been a while. But I did look at the testimony, and I
4 do remember Dean and Brian coming over. Dean and Brian,
5 they hung out for a while. And I remember that my friend
6 from Ohio State was coming, Sandra, and Dean adored Sandra.
7 We always all had fun. Dean had come to Ohio State a couple
8 times.

9 And she was late, and it was getting dark. And she was
10 not -- she would not drive at dark. So I just remember
11 that's why that sticks out, that ceiling fan that Saturday
12 and then Dean and Brian coming over and they hang out. And
13 they were hanging out, and they had to go. And I was like
14 worried about my friend Sandra, and I remembered it was
15 almost dark and she wasn't there. I don't know why I
16 remember that, but I remember it.

17 Q. Now, were you tight with somebody named Marie Woods?

18 A. Not really. We knew each other in school, but we
19 weren't like best friends. At all.

20 Q. Okay.

21 A. I mean, we were friends, though. I was friends with a
22 lot of different people in school, but it wasn't one of my
23 core group friends.

24 Q. Was she closer to Dean?

25 A. Yes.

1 Q. And I know you just mentioned it a minute ago. Before
2 you testified -- you are testifying here today -- you reread
3 your testimony from the original trial; is that right?

4 A. Yes.

5 Q. Okay. And is that what you are referring to a minute ago
6 when you said "I read it in testimony"?

7 A. Yes. I'm sorry, yes.

8 Q. You're good.

9 A. Yes.

10 Q. And do you remember there came a time after this weekend
11 when you had that party where you looked at Marie Woods's
12 calendar?

13 A. It was shown to me.

14 Q. Okay.

15 A. When I think -- I don't know which trial. In one of
16 the first ones, the attorney showed it to me in the office.
17 That's how I saw it. I never even really knew about the
18 calendar until the trial stuff.

19 Q. Got it. Did you have any reason to doubt it or did it
20 conflict with your memory at all --

21 A. No.

22 Q. I'll ask a new question.

23 A. Sorry.

24 Q. No problem. Did you have any reason to doubt or did it
25 conflict with your memory at all back in 1990 that that was

1 the weekend that you had the party at your parents' house?

2 A. I didn't have any doubts about that.

3 Q. Did you ever have any other parties at your parents'
4 house after Brian broke the ceiling fan?

5 A. No, never again. I might have had a couple girlfriends
6 over, but never had a party with people coming in and out.

7 MR. OWENS: Those are my questions, Your Honor.

8 THE COURT: All right. Cross?

9 MR. McLANDRICH: Yes, just briefly, Your Honor.

10 **CROSS-EXAMINATION**

11 BY MR. McLANDRICH:

12 Q. Good afternoon, Miss.

13 A. Hi.

14 Q. Hi. Really just one or two questions.

15 I reviewed the testimony from back in the day as well,
16 and so this would have been August 6th -- I'm sorry -- 26th --
17 no, 6th, the party you had, right?

18 A. Yes, I think so. I don't -- I think that was the date.

19 Q. Yes.

20 A. I'm not sure.

21 Q. And at the trial, you testified that Dean, Mr. Gillispie,
22 got there about 7 o'clock and left about 9 or 9:30. Does that
23 comport with your memory?

24 A. Well, honestly, that jogged my memory when I read it.
25 I didn't remember the exact time, 7. I don't know. Back

1 then I must have remembered 7 being the time. I just
2 remember that it was dusk when he was leaving.

3 THE COURT: I guess, Counsel, probably the best way
4 to approach this is ask her what she remembers. And if she
5 doesn't remember, then you can refer her to the transcript.

6 MR. McLANDRICH: Thank you.

7 BY MR. McLANDRICH:

8 Q. So do you remember independently the time that
9 Mr. Gillispie came to your house and left on the 6th?

10 A. Not necessarily. I just remember that he came. They
11 stayed a while, a few hours, and they left when it was
12 getting dark and I was worried about my friend. That's just
13 the part that I remember. I can't tell you what time it
14 was.

15 MR. McLANDRICH: Jeff, would you bring up
16 Plaintiff's 5? And it's document page 134, transcript page
17 532.

18 (Exhibit displayed.)

19 BY MR. McLANDRICH:

20 Q. If you go to line 5 you are asked the question, "The
21 first time you saw him on that particular day was when Brian
22 and he came to your home?"

23 "Witness nodding head in the affirmative" was the answer.

24 And then, "Question: And that was about two hours before
25 they left for Bourbon Street at 9 o'clock?"

1 And, again, "Nodding head in the affirmative."

2 Does that refresh your recollection?

3 A. Yes.

4 Q. And so the first time you would have seen Mr. Gillispie
5 would have been around 7 o'clock, and he would have left a
6 couple hours later, 9, maybe 9:30?

7 A. That's what I remember.

8 MR. McLANDRICH: All right. Thank you, Miss.
9 That's all I have for you.

10 THE COURT: Anything with regard to that?

11 MR. OWENS: Just one question with regard to that.

12 THE COURT: All right.

13 **REDIRECT EXAMINATION**

14 BY MR. OWENS:

15 Q. Was there a reason you all liked to hang out at Bourbon
16 Street on Friday nights?

17 A. I think they had -- if I remember correct, they had
18 Long Island Iced Tea for like \$1.

19 MR. OWENS: That's it.

20 THE COURT: You want to follow that up?

21 MR. McLANDRICH: No, Your Honor. Thank you.

22 MR. OWENS: That's all we have for this witness,
23 Your Honor.

24 THE COURT: Any reason this witness cannot be
25 excused?

1 MR. McLANDRICH: No, sir.

2 THE COURT: Thank you, ma'am.

3 I'm going to make an assumption that we are not going to
4 be able to get another witness on in ten minutes. Is that
5 right?

6 MR. OWENS: That would be a correct assumption, Your
7 Honor.

8 I mean, can we have one moment to confer, Your Honor?

9 THE COURT: Sure.

10 MR. OWENS: Have a great night.

11 THE COURT: Ladies and gentlemen of the jury, we're
12 done today. I want to thank you for your patience, your
13 attention. It's been another long day, but we're getting
14 through a lot of -- a lot of witnesses, a lot of testimony, a
15 lot of evidence.

16 As far as we've gotten, though, however, it wouldn't be
17 right for you to start discussing the case with anyone or
18 formulating any opinions or drawing any conclusions. So tell
19 your family to be patient. Once this case is over, then you
20 can tell them everything. You can just bend their ear, but
21 until then, please don't do that.

22 So hopefully you will have a wonderful evening. We'll
23 recess for the day. And if I could ask you to just make sure
24 your tablets are on your seats.

25 Anything further, counsel?

1 MR. OWENS: No. Thank you, Judge.

2 THE COURT: Counsel?

3 MR. McLANDRICH: No. Thank you, Your Honor.

4 THE COURT: Counsel?

5 MR. HERMAN: No, Your Honor.

6 THE COURT: I might see counsel for like 30 seconds
7 in chambers.

8 THE COURTROOM DEPUTY: All rise. This court stands
9 in recess.

10 (Jury out at 3:51 p.m.)

11 (Court adjourned at 3:51 p.m.)

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1 CERTIFICATE OF REPORTER

2
3 I, Mary A. Schweinhagen, Federal Official Realtime
4 Court Reporter, in and for the United States District Court
5 for the Southern District of Ohio, do hereby certify that
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13 s/Mary A. Schweinhagen

14 _____ 20th of December, 2023

15 MARY A. SCHWEINHAGEN, RDR, CRR
16 FEDERAL OFFICIAL COURT REPORTER
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